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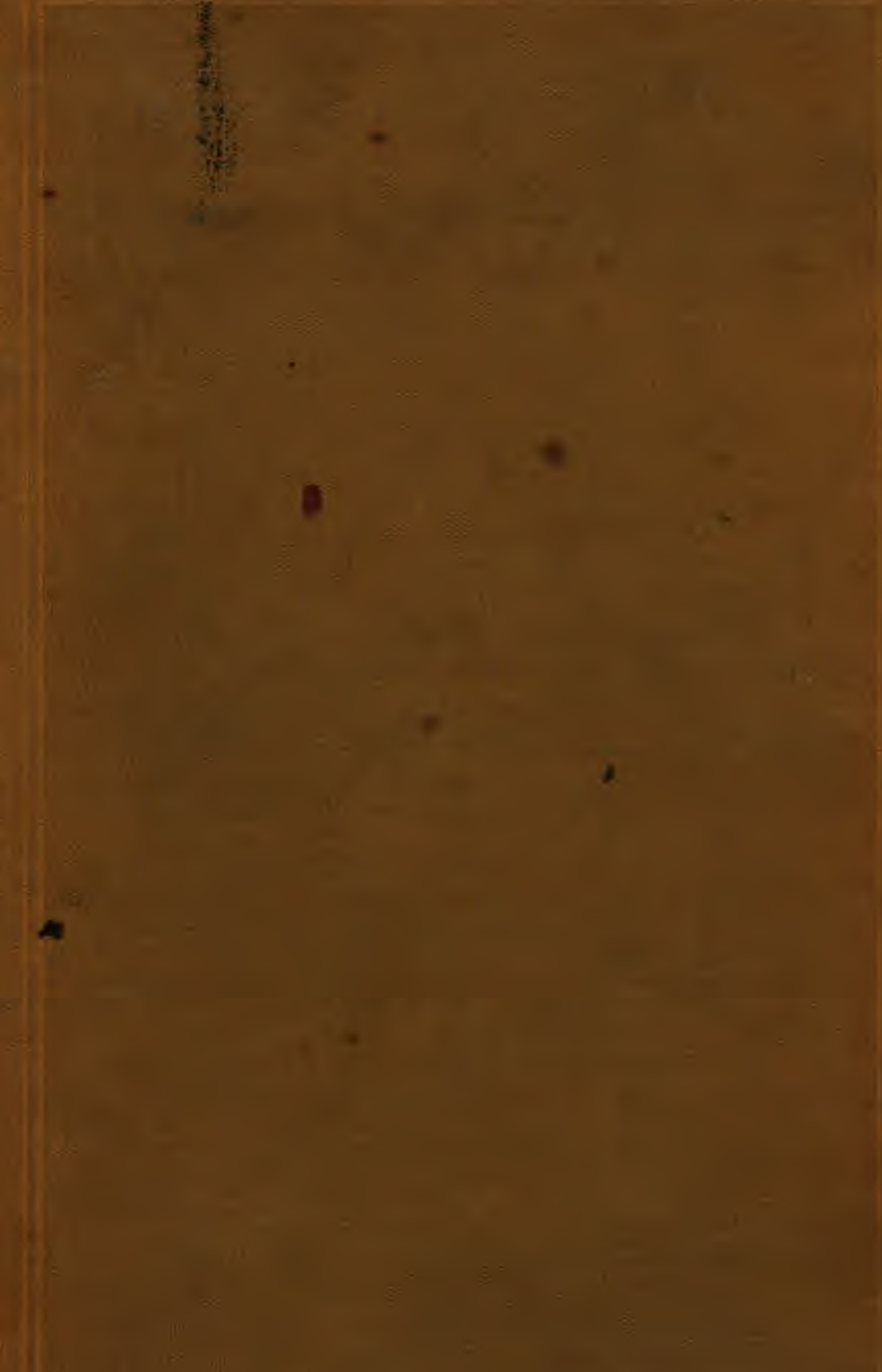
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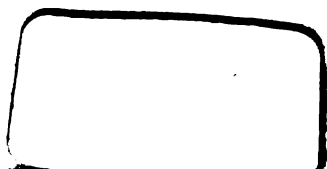
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A TREATISE
ON THE
PRINCIPLES OF PLEADING

BY
JAMES GOULD, LL.D.

**COMPRISING RULES OF PRACTISE AND A DESCRIPTION OF
FORMS OF ACTION AND ADAPTED TO THE
MODERN CODES OF PROCEDURE**

FOURTH EDITION BY
GEORGE GOULD
JUSTICE OF THE SUPREME COURT OF NEW YORK

FIFTH EDITION BY
FRANKLIN FISKE HEARD

SIXTH EDITION BY
ARTHUR P. WILL, LL.M.
OF THE NEW YORK BAR

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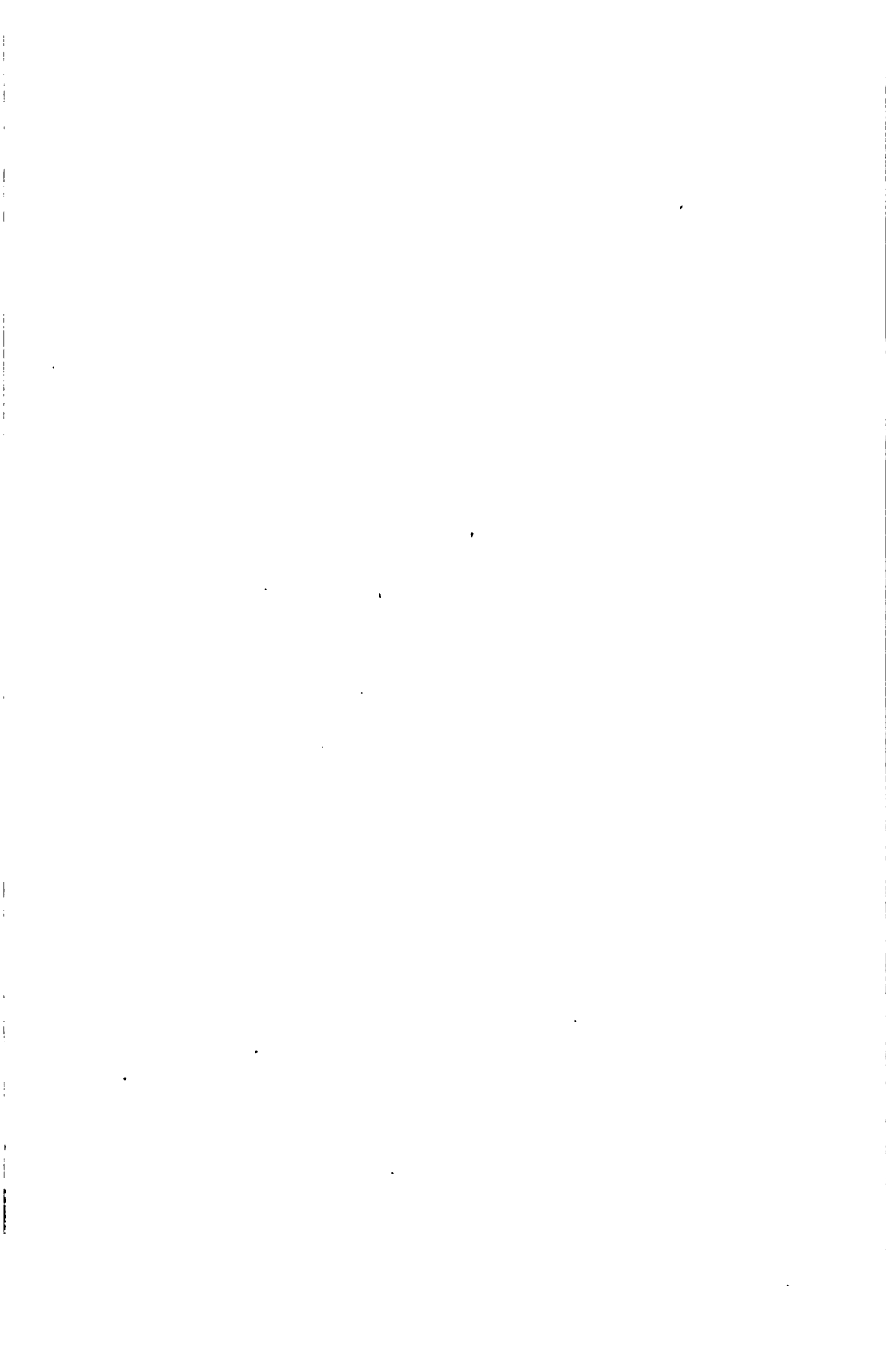
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TO
HENRY WADE ROGERS, LL.D.,
MY
FIRST INSTRUCTOR IN THE LAW,
THIS WORK IS
AFFECTIONATELY DEDICATED.



ERRATA.

- Page 10. Line 1, insert the word "be" after word "must."
- Page 50. Line 3, word "courts" should read "counts."
- Page 73. Second line of Note "n," insert "I" in blank space after word "Note."
- Page 74. Note "t," insert "II" at end of line after word "Note."
- Page 241. In headline, word "Degrees" should read "Certainty."
- Page 259. In headline, word "not" should read "with."
- Page 420. Note A, second line, after word "Appendix" insert "V."
- Page 495. Under Note "r" in blank space after the words "So some codes provide that under a" —, insert the words "general denial."
- Page 537. Heading to Chapter IV should read "Chapter III."
- Page 570. Heading to Chapter V should read "Chapter IV."
- Page 589. In note "further of demurrers under the Codes" the words "Judge Waller" should read "Judge Walter."

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PREFACE.

The aim of this edition is to exhibit pleading as both a science and an art. During the development of the art there have been, in the regulations which govern its practice, alterations, elisions, additions and substitutions. But the old rules and the modern rules of pleading, taken together, form but one entire system.

The text of the original edition has been preserved because it is recognized by the courts as authoritative. The notes in the Third edition have proved to be of great value and have been retained. The same is true regarding the notes to the Fourth edition. The present edition embraces much new matter including chapters on forms of action, amendments, election of remedies and numerous matters of daily importance in practice. Care has been taken to avoid the use of obsolete terms and unnecessary technicalities. The citations are numerous and have been carefully selected from every jurisdiction with a view to utility. The annotations are extensive and show clearly the origin of modern rules and the close connection between the present and the former style of pleading, and the necessity in every jurisdiction of knowing the fundamental rules.

“The law’s delay,” which amounts in many cases to a virtual denial of justice, is a fault in our system which is at the same time a reproach and a menace and for which an effective remedy must be found quickly. It is evident that, in

New York, at least, the proper place to begin the work of reform is with the so-called reformed code of civil procedure. The evils resulting from the extreme technicality of the code have been convincingly pointed out by Mr. Hornblower, Judge Alton B. Parker, Mr. Fiero and other high authorities. It is an anomaly that this code continues to exist in the midst of universal condemnation. Further amendment will result in denser confusion and will not do. That method has had repeated trials and has been found wanting. The reform on the next attempt must be real. In this age of Commissions here is work which demands the most eminent talent and the result of which ought to bear the imprimatur of the court of last resort.

Next to a code prepared by skilled practitioners the courts and the profession ask that more of the schools of law shall give a constant and whole-hearted attention to the subjects of pleading and practice. Perfunctory work in this department of the law is expensive to the student and to the community. The value of a right is not great if its possessor cannot enforce it or protect it. Pleading should be taught not only in a thorough course devoted ostensibly to the subject, but as a branch of every course on a so-called substantive title—and as a matter of constant and vital interest, not as a mere nebulous theory or abstract speculation.

ARTHUR P. WILL.

NEW YORK, *December*, 1908.

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PART I.

FORMS OF ACTIONS.

CHAPTER I.

DEFINITIONS.

UBI JUS IBI REMEDIUM.—The chief end of organized society is the proper administration of justice. In recognition of this political and philosophical truth it is the policy of the common law, as expressed in the ancient maxim *ubi jus ibi remedium*, to provide a means of redress for every wrong or violation of duty. (a)

ACTION.—The method provided by law for enforcing a right or redressing a wrong is termed an action. This but paraphrases the language of Coke who, following earlier writers, defined an action as the legal demand of one's right. (b)

(a) *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 69 L. R. A. 101; *Huntley v. Louisville & N. R. Co.*, 105 Ky. 62, 63 L. R. A. 289; *Brown v. Cole*, 104 N. Y. Suppl. 109.

See *infra*, Trespass on the Case.

(b) *Actio n'est autre chose que loyall demande de son droit*. Co. Litt., 285,a. And see 3 Black. Com. 116, 117; *Bradlaugh v. Clark*, 8 App. Cas. 361; *Webster v. County Com'rs.*, 63 Me. 27; *Valentine v. Boston*, 20 Pick. 201; *Badger v. Gilmore*, 37 N. H. 457; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Missionary Society, etc., v. Ely*, 56 Ohio St. 405; *Appeal of McBride*, 72 Pa. 280.

See also the statutory definitions of various states.

SUIT.—The word "Suit" was formerly used to designate a proceeding in equity as distinguished from a litigation in a court of law which was termed an action; (c) but generally at this day the terms are used interchangeably. (d)

CAUSE OF ACTION.—A cause of action is made up of two elements; viz., a duty and a breach of it; (e) and may be de-

In *People agt. Colborne*, 20 How. Pr. 378, 380, the court said: "Bracton, I think, embodies the whole idea of an action much better, in the Latin expression, '*trinus actus, trium personarum*', which seems to include not only the act of a plaintiff, who makes a lawful demand, and the act of a defendant, in opposition; but also, the act of a court in passing judgment between the parties."

ACTIONS ARE CIVIL AND CRIMINAL.—Actions are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas. Co. Litt. 284 b. "A civil or criminal form of *action*." 2 Peters, 538.

The system of pleading, at common law, is, in principle, the same, both in civil and criminal cases. Lord Denman, C. J., in *Campbell v. The Queen*, 11 Q. B. 810; Willes, J., in *Regina v. Rearden*, 4 F. & F. 77, 80; Littledale, J., in *Baylis v. Lawrence*, 11 A. & E. 925; Blackburn, J., in *Heymann v. The Queen*, L. R. 8 Q. B. 105; Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 619. There is no distinction except that according to the spirit in which the law is administered, if there is a difference, more strictness is required in criminal than in civil pleading; and in the former a defendant is allowed to take advantage of nicer exceptions. Lord Mansfield, C. J., in *The King v. Beech*, 1 Leach C. C. 134; Bramwell, L. J., in *Bradlaugh v. The Queen*, 3 Q. B. D. 619. An indictment is to a criminal action what a declaration is to a civil action. And when the criminal law is silent as to the form of an indictment, in any particular case, resort may be had to the rules and principles which are applicable to the structure of a declaration in a civil action. 2 Gabbett Crim. Law, 197; Heard Crim. Pl. 29.

(c) *Appleton v. Turnbull*, 84 Me. 72.

(d) *Page v. Brewster*, 58 N. H. 126; *Niantic Mills Co. v. Riverside & O. Mills*, 19 R. I. 34; *Meyers v. State*, (Tex.) 105 S. W. 38; *Lamsing v. Hutchings*, 118 Fed. 321. And the words "*cause*" and "*case*" are frequently used with the same meaning. *Scott v. Perkins*, 28 Me. 22; *Blyew v. United States*, 13 Wall. 581, 595.

(e) *A. T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 600; *Clarke v. Ohio Riv. R. Co.*, 39 W. Va. 732. And see, *Taylor v. Mayor*, etc., 82 N. Y. 10, 17.

defined as the combination of a right belonging to the plaintiff and the obligation, duty, or wrong of the defendant. (f) Stated more concretely and from the standpoint of the pleader, it is the set of existing facts which entitles the plaintiff to the relief claimed. It is this set of facts which he must show in his declaration in order to make out a case for relief.

And notwithstanding the code provision abolishing the distinction between forms of action, the precise nature of the cause of action must be determined before the rules of law applicable thereto can be ascertained and applied. (g)

SUBJECT OF ACTION.—The “subject of the action” is an entirely different thing from the cause of action, and refers to violated rights. (h)

REMEDY.—The remedy is the result which the action is intended to procure, the *object* of the action as distinguished from the *cause* of the action. (i)

DIVISIONS OF CIVIL ACTIONS.—Civil Actions are divided into two great classes; viz., actions *ex contractu* and actions *ex delicto*, according to the nature of the cause of action.

(f) *Wildman v. Wildman*, 70 Conn. 700, 708 (citing Yale Law Journal, March, 1889, p. 246, per Prentice, J.; *Phillips on Code Pleading*, § 31). And see, *Veeder v. Baker*, 83 N. Y. 156, 160; *Oliver v. Columbia, N. & L. R. Co.*, 55 S. C. 541; *Goodrich v. Alford*, 72 Conn. 257, 260. More technically, an action is defined as the right or power to enforce an obligation; and a cause of action, as simply the obligation. *Frost v. Witter*, 132 Cal. 421, 426.

(g) *Carbondale I. Co. v. Burdick*, 67 Kan. 329. And see *infra*, Election of Remedies, and Theory of Action.

For example, a new cause of action cannot be introduced by amendment. See Amendments.

(h) The definition of these terms was considered in *Scarborough v. Smith*, 18 Kan. 399, in deciding what causes of action could be united in one suit. “The subject of action,” said the court, “must exist prior to the creation of the causes of action which are to be united; for the causes of action are such as arise out of transactions connected with the subject of action.”

(i) *Wildman v. Wildman*, 70 Conn. 700.

Whether an action is an action *ex contractu* or *ex delicto* is to be determined by an examination of the pleadings. (j)

An Action *ex contractu* arises out of contract, and is one that seeks to recover for the breach of a contract express or implied.

An Action *ex delicto* is based upon a tort or wrong which may or may not grow out of, or be coincident with, a contract. An action of this class may be based upon the breach of a duty imposed by law in consequence of a contract relation. But in such a case the action is in no sense based upon

(j) *O. P. Rly. Co. v. Shook*, 3 Kan. App. 710.

The facts stated in a complaint may constitute both a cause of action on contract, and a cause of action on tort, or two or more of either; and then if the reliefs for the two or more causes of action are inconsistent, the plaintiff would be required to elect which of the same he would take. *Akin v. Davis*, 11 Kan. 580, per. Valentine, J. See *infra*, Election of Remedies.

"Actions *ex contractu* and *ex delicto* may, as a rule, be very distinguishable; but it is sometimes difficult to say to which class a particular action belongs." Lindley, L. J., in *Midland Railway Co. v. Withington Local Board*, 11 Q. B. D. 796. "Formerly, when there were forms of action, there would have been little difficulty in determining whether an action was founded on contract or tort, but now that the claim is made by a narration of facts, it does not always clearly appear to which class, contract or tort, the case properly belongs." Cockburn, C. J., in *Pontifex v. Midland Railway Co.*, 3 Q. B. D. at p. 26.

In Pennsylvania the act of May 25, 1887, grouped together into an action of assumpsit those demands arising *ex contractu* which were theretofore recoverable in debt, assumpsit or covenant, and all actions of trespass, trover or trespass on the case into one action to be called an action of trespass. But this did not abolish the distinction between actions *ex contractu* and actions *ex delicto*. *Corry v. R. R. Co.*, 194 Pa. 516; *Osborn v. First National Bank*, 154 Pa. 134.

In *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, the court, after pointing out that the case was one where contract and tort, as classifying causes of action blended, said that under the new procedure the theoretical distinction is rarely a practical one, for judgment must follow proof of the facts alleged. "When the complaint sets forth facts sufficient to support a cause of action, and

the contract, though the declaration will recite the contract as a part of the history of the transaction. (k)

According to the subject, actions were at common law either real, personal, or mixed.

those facts are established by the evidence to the satisfaction of the trier, the court must pronounce the sentence of the law upon the facts as found."

As explaining this point of view, see *infra*, ELECTION OF REMEDIES; THEORY OF CASE.

(k) *Van Oss v. Synon*, 85 Wis. 661, 664.

THE TERM "TORT" means a wrong, but in its legal sense it is of narrower signification. For a wrong for which the law does not give the right to recover damages is not a tort. To constitute a tort two things must concur—a wrongful act committed by the defendant, and proximate legal damage to the plaintiff. *Trow v. Thomas*, 70 Vt. 580, 584, per Taft, J.; Bayley J., in *King v. Pagham Commissioners*, 8 B. & C. 362. And see, *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59.

The wrong may arise though no contract be in existence between the parties, or it may arise in consequence of the contract relation. Said Mr. President Judge Rice, in *Hoehle v. Heating Co.*, 5 Pa. Super. Ct. 21, at p. 24: "A tort is generally defined to be 'a wrong independent of contract;' but this broad definition, when correctly understood, is entirely consistent with the well settled general proposition that in certain relations duties are imposed, the breach of which is regarded as a tort, though the relations themselves are formed by contract, and the contract may cover the same ground." See also, *Denning v. State*, 123 Cal. 316, 323 (citing Cooley, Elements of Torts); *L. & N. R. Co. v. Spinks*, 104 Ga. 692; *Acker, Merrill & Condit Co. v. McGaw*, (Md.) 68 Atl. 17; *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382; *Drum v. Miller*, 135 N. C. 204, 65 L. R. A. 890.

CHAPTER II.

REAL ACTIONS.

DEFINITION.—Real actions at common law were those by which all disputes concerning corporeal hereditaments were decided. The plaintiff in these actions was called the demandant. Owing to the intricacy of the procedure they gradually fell into disuse and were supplanted by certain mixed actions.(a)

THE WRIT OF RIGHT was the remedy resorted to by one who sought the specific recovery of corporeal hereditaments in fee simple. It could be brought only by one in whom was the fee simple title and it was necessary to allege such title in the count. But it was never necessary to allege a disseizin, or to prove an actual entry.(b)

FORMEDON.—By the common law one who had less than a fee simple estate, and who could not resort to a possessory

(a) In England, the only real actions which survived the sweeping statute of 3 & 4 Will. IV, c. 27 were dower, *quare impedit* and ejectment.

(b) *Lyon's Heirs v. Mottuse*, 19 Ala. 463; *Plummer v. Walker*, 24 Me. 14; *Copp v. Lamb*, 12 Me. 312; *Bradstreet v. Clarke*, 12 Wend. 602; *Green v. Litter*, 8 Cranch. 229.

IN IOWA an action of right was provided by an early statute and was in use till the adoption of the code. This action enlarged upon the writ of right, superseded ejectment and was an adequate remedy in all possessory actions and to establish title by seisin or inheritance. *Kerr v. Leighton*, 2 Greene 196.

WRIT OF ENTRY is the comprehensive action which now takes the place, in Maine, of all the old real actions. Rev. Stat. of Me. (1903.) Ch. 106.

EJECTMENT.—In many states ejectment will now lie whenever a writ of right would have been proper at common law.

action, had no way of redressing an injury. Therefore the statute of Westminster 2 (13 Edw. I) provided the

Writ of formedon by which one as issue in tail, or as remainderman or reversioner after an estate tail, could recover lands and tenements specifically. (c)

THE WRIT OF DOWER *unde nihil habet*, was the name of the action by which a widow recovered her dower specifically when no part of it had been assigned to her. (d)

The writ of dower is still preserved in several of the states in a more or less modified form. Such statutes perpetuate the provision of the statute of Merton (20 Hen. III) and allow the plaintiff, if successful, to recover damages for the detention; as indeed, in general, do all statutes providing a remedy for the recovery of the widow's dower. (e)

At common law after dower had been assigned in an action of dower, the widow might maintain ejectment if possession was denied. And now, in many states ejectment is the only remedy by which dower can be recovered. (f) And under the codes the remedy is a suit in the nature of ejectment, recognizing the rules governing the old equity suit for

(c) There were several forms of this writ known as *formedon* in the remainder (See *Wells v. Prince*, 4 Mass. 64), *formedon* in the *descender* (See *Dudley v. Sumner*, 5 Mass. 438), and *formedon* in the *reverter* (*Gilliam v. Jacocks*, 11 N. C. 310).

(d) This writ which was preserved by the Statute 3 & 4, Will. IV, ch. 27, was abolished in England by the Judicature Act.

There was anciently another species of the action known as the writ of right of dower which was used to recover part of the dower, the widow having already received a part from the tenant.

(e) See Rev. Stat. of Maine (1903) ch. 105. *Harrington v. Connolly*, 116 Mass. 69; 1 *Pepper & Lewis Dig.* (Pa.) 1677 *et seq.*; *Gourley v. Kinley*, 66 Pa. 270; *Roan v. Holmes*, (Fla.) 21 L. R. A. 180, and cases cited in note; *Gordon v. Gordon*, 80 App. Div. 258.

A widow may claim her statutory dower by the common law action when the land is in the adverse possession of one denying her right, or of one not amenable to the orphans' court process. *McFadden v. McFadden*, 32 Pa. Super. Ct. Rep. 534.

(f) *Galbraith v. Fleming*, 60 Mich. 408.

the admeasurement of dower which was collateral with the common law jurisdiction where the title was admitted.(g)

THE WRIT OF *quare impedit* was never of any importance in this country. It was the means by which one recovered the right of presentation to a benefice.(h)

(g) See *Badgley v. Bruce*, 4 Paige 98; N. Y. C. C. P. §§ 1596 *et seq.* Statutory remedies for the allotment of dower do not exclude courts of equity from the exercise of their appropriate and accustomed jurisdiction. *Johnson v. Johnson* (Ark.) 105 S. W. 864.

(h) 3 Cooley's Black. 246, *et seq.*

CHAPTER III.

MIXED ACTIONS.

WRIT OF ENTRY.

NATURE OF THE ACTION.—For centuries various writs known as writs of entry were used in England to recover the possession of land. These gradually fell into disuse on account of the complex nature of the procedure; and, as the action of ejectment was more and more resorted to, they became virtually obsolete. They were ultimately abolished in England by Statute 3 & 4 Will. IV.

One of these old writs, the writ of entry *sur disseisin*, has been employed in several states as a common law action though its use as such has been discouraged by the court and the plaintiff held to the most minute exactness. (a)

IN A MODIFIED FORM this writ is still in use in Maine, Massachusetts and New Hampshire, where by statute any estate of freehold may be so recovered. (b)

COMMENCEMENT OF THE ACTION.—A writ of entry must be served by attachment and summons or copy of the writ, and not by a *capias* writ. (c)

(a) So in Pennsylvania where it was said in *Witherow v. Keller*, 11 S. & R. 271, that it was no objection to the form of action that it was never used till after our independence.

(b) In *Caperton v. Schmidt*, 26 Cal. 479, 496, it was said that the pleadings in the code action to recover the possession of land were "more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment."

(c) *Richardson v. Rich*, 66 Me. 249.

WHAT MUST SHOWN IN THE DECLARATION.—The Supreme Judicial Court of Maine has pointed out that four things are necessary to a good declaration in a writ of entry: 1, The premises demanded must be clearly described; 2, The estate which the demandant claims in the premises must be stated; 3, An allegation that the demandant was seized of the estate claimed within twenty years; 4, A disseisin by the tenant.(d)

A general description in the language of the statute is sufficient,(e) and the description, if insufficient, may be amended on the trial.(f)

DEMANDANT'S ESTATE.—In Massachusetts the demandant declaring on his own seisin alleges a disseisin and is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry. The suit is prosecuted and conducted as if the demandant had made an actual entry and had been immediately ousted, and if he proves his estate and right of entry he recovers unless the tenant proves a better title in himself.(g)

DEMANDANT MUST RECOVER ON STRENGTH OF HIS OWN TITLE.—As in ejectment the demandant must recover on the strength of his own title and not on the weakness of his adversary's, and the equitable title is not sufficient.(h)

THE TITLE IS THE REAL QUESTION.—And under the general issue the real struggle is over the question as to which party can show the better title in himself.(i)

THE GENERAL ISSUE IS "nul disseisin," and puts the whole title in issue.(j)

(d) *Wyman v. Brown*, 50 Me. 139.

(e) *Baker v. Bessey*, 73 Me. 472.

(f) *Howe v. Lowell*, 171 Mass. 575.

(g) *Twomey v. Linnehan*, 161 Mass. 91.

(h) *Eastman v. Fletcher*, 45 Me. 302.

(i) *Wyman v. Brown*, 50 Me. 139; *Weston v. Nevers*, 72 N. H. 65; *Lear v. Durgin*, 64 N. H. 618 (where the defendant offered no evidence).

(j) *Hewes v. Coombes*, 84 Me. 434.

Under it the tenant may show title in himself, or may disprove the title set up by the demandant. *(k)*

POSSESSION IS BETTER THAN NO TITLE, and possession under a claim of right constitutes legal seisin which will avail against everyone not having an older and better title. *(l)*

But a concurrent or mixed possession, without priority in favor of either party, will not support an action by either party against the other. *(m)*

WHO MUST BE DEFENDANT.—In general the action must be against a person claiming an estate not less than a freehold; but if the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, though he claims an estate less than a freehold. *(n)*

MESNE PROFITS RECOVERED.—The statutes provide for settling in one suit both the title to the land and the claim for damages and *mesne* profits, the object being to adjust the rights of both parties upon equitable principles. *(o)*

But to recover *mesne* profits it is essential that the writ should claim them. *(p)*

(k) *Swan v. Stephens*, 99 Mass. 7.

The demandant must show his seisin for twenty years. So, under the general issue, to disprove this seisin, the defendant may show title in a third party although not claiming under him. Evidence to rebut the demandant's seisin is received, not to show a better title in the tenant but to show no title in the demandant within the period of twenty years. *Stetson v. Grant*, 102 Me. 222.

(l) *Pettengell v. Boynton*, 139 Mass. 244.

One being in possession, even if it is not such as would amount to a disseisin of the true owner, may maintain trespass against a mere intruder without right upon that possession, and if he is ousted by such an intruder he may maintain a writ of entry against him. *Litchfield v. Ferguson*, 141 Mass. 97.

(m) *Litchfield v. Ferguson*, 141 Mass. 97.

(n) *Wyman v. Brown*, 50 Me. 139.

(o) *McMahan v. Bowe*, 114 Mass. 140.

(p) *Stubbs v. Railway Co.*, 101 Me. 355.

THE MEASURE OF DAMAGES.—The measure of the recovery of rents and profits is the clear annual value of the premises; that is to say, the fair rentable value for any purpose to which it might have been applied, and not the conjectural value for use in connection with adjoining premises. (*q*)

JUDGMENT, HOW EXECUTED.—Upon judgment for the demandant a writ of possession issues in accordance with statutory provisions. (*r*)

(*q*) *Stubbs v. Railway Co., supra.*

(*r*) *Proctor v. M. C. R. R. Co., 101 Me. 459.*

CHAPTER IV.

WASTE.

HISTORY OF THE ACTION.—Waste, at common law, was a real action which could be maintained for an injury to lands, houses and woods to the prejudice of the heir. By the statute of Gloucester (6 Edw. I ch. 5), the plaintiff could recover not only the possession of the property but treble damages for the injury. Thereafter the action was considered a mixed action and was based partly on the common law and partly on the statute.(a) After having been long in disuse in England the action was abolished by the Statute 3 & 4 Will. IV, ch. 27.

This action was never much in use in this country, the action on the case in the nature of waste for the recovery of single damages only being resorted to in its stead, as it had long superseded in England the old action of waste.(b)

WHO COULD MAINTAIN WASTE?—The action of waste could be maintained by one only who, at the time of the alleged waste, had in him an estate of inheritance without any intervening outstanding estate.(c) So a contingent remainderman could not maintain the action.(d)

(a) See *Sackett v. Sackett*, 8 Pick. 309; *Stevens v. Rose*, 69 Mich. 259; *Moore v. Townshend*, 33 N. J. L. 284, 300.

(b) *Randall v. Cleaveland*, 6 Conn. 328; *Palmer v. Young*, 106 Ill. App. 252; *Stevens v. Rose*, 69 Mich. 259; *Moore v. Townshend*, 33 N. J. L. 284; *Dorsey v. Moore*, 100 N. C. 41.

(c) See *Robinson v. Wheeler*, 25 N. Y. 255.

(d) *Latham v. Moore*, 130 N. C. 9.

But the action on the case in the nature of waste could be maintained by one in remainder for life or years as well as by the reversioner in fee. (e)

AGAINST WHOM WOULD THE ACTION LIE?—Originally the action of waste would lie only against the holder of the legal estate of a guardian in chivalry or a tenant in dower or by the curtesy. These were estates created by the law itself, and it was requisite that the law should provide a remedy by which the heir could preserve his inheritance. In the case of an estate created by the act of the party himself, as a tenancy for life or for years, he could protect himself by his deed or lease and so could not maintain waste. But after the statute of Marlbridge (52 Hen. III, ch. 23) tenants for life and tenants for years were liable for permissive waste. This statute and the later statute of Gloucester, which, in this country, are considered as a part of the common law, did not include tenants at will because as to them the owner of the inheritance might enter at any time and thus terminate the estate and protect his property. Tenants of this class, however, were punishable for voluntary waste by action of trespass as at common law. (f)

THE STATUTORY ACTION which in most of the states is provided as a substitute for waste, it may be said generally, may be prosecuted by the owner of any estate in remainder or reversion notwithstanding any intervening estate for years, and against any tenant for life or for years, or against cotenants or guardians. (g)

THE ACTION AGAINST A STRANGER.—At common law the remainderman could not maintain waste against a stranger, but he could recover from the tenant for injuries committed by a stranger and the tenant could recover in an action of

(e) *Dennett v. Dennett*, 43 N. H. 499.

(f) *Newbold v. Sabronsky*, 44 N. J. L. 266; *Moore v. Townshend*, 33 N. J. L. 284.

(g) *Purton v. Watson*, 2 N. Y. Suppl. 661.

trespass against the stranger for the injury to the possession. *(h)*

But the action on the case in the nature of waste was not thus restricted. *(i)*

ALTERNATIVE REMEDIES.—In Maine either the action of waste may be maintained for the possession and damages, or the action on the case for damages, but not both. This virtually gives the plaintiff a choice between the remedies provided by the statutes of Marlbridge and Gloucester. *(j)*

SUBSTITUTES.—In Georgia the statute provides for a forfeiture of the estate by the life tenant as the result of waste, at the election of the remainderman or reversioner. Whether in addition the remainderman has a remedy in damages does not appear. *(k)*

WHAT CONSTITUTES WASTE?—The waste may consist in cutting timber, or in removing a building, or in allowing a farm to go to rack or ruin, or in any acts of commission or of omission that decrease the value of the inheritance. And just what acts will constitute waste must depend on circumstances of time and place, the character of the country and local conditions and usage.

THE MEASURE OF DAMAGES is the difference between the value of the property before the acts complained of were committed and afterwards. In practice the jury finds the actual damage and the court renders judgment for treble the amount of the verdict. *(l)*

The allowance of treble damages is considered harsh in

(h) *Wood v. Griffin*, 46 N. H. 230, 238.

(i) *Randall v. Cleaveland*, 6 Conn. 323; *Learned v. Ogden*, 80 Miss. 769; *Dorsey v. Moore*, 100 N. C. 41.

(j) *Stetson v. Day*, 51 Me. 434.

(k) *Belt v. Stinkins*, 113 Ga. 894.

(l) *Beers v. St. John*, 16 Conn. 321; *Harder v. Harder*, 26 Barb. 409; *Cole v. Bickelhaupt*, 64 App. Div. 6; *McCartney v. Titsworth*, 104 N. Y. Suppl. 45.

some jurisdictions and is there no longer provided for;(m)
but this is not the prevailing rule.(n)

(m) *Learned v. Ogden*, 80 Miss. 769.

(n) *Erbe v. Smith*, 35 Mont. 38; *Cole v. Bickelhaupt*, 64 App. Div. 6.

THE CODE OF CALIFORNIA, as construed by the courts, allows the recovery of treble damages for waste committed willfully and wantonly or maliciously by a guardian, tenant for life or for years, joint tenant or tenant in common. *Isom v. Rex Crude Oil Co.*, 140 Cal. 678.

CHAPTER V.

EJECTMENT.

ORIGIN OF THE ACTION.—Ejectment came into common use during the fifteenth century. It was originally a mere writ of trespass and by it a tenant for a term of years could recover damages for forcible ejection from the land. The action was favored by the courts who decreed, as relief additional to damages, that the plaintiff should recover possession of the land. This mode of recovering possession of specific real property being much more convenient, and much less technical, than the old real actions, in course of time came to be resorted to by claimants of land without regard to the nature of the title upon which they relied. Those plaintiffs whose cases did not fall within the original scope of the action resorted to a fictitious mode of procedure which was favored by the courts and passed into regular practice.

NATURE OF EJECTMENT.—On account of the nature of the old writ the action is classed by some as a personal action.

But it is said as to the modern action that, as it is used chiefly to settle the title to real estate, it is distinctively a real action. (a)

The action provided by statute in most of the States for the recovery of real property is the successor of the old action of ejectment, and follows it in important respects, but it is

(a) *Hubbard v. Godfrey*, 100 Tenn. 150, 159. And see *Providence v. Comstock*, 27 R. I. 537.

characterized generally as a mixed action. In no sense is it an action *ex contractu*.(b)

COMMON LAW PRINCIPLES GOVERN.—Generally it may be said that while the modern statutes regulate to some extent the procedure resort must be had to the common law for the principles governing the action.(c)

A POSSESSORY ACTION.—This action is, strictly speaking, a possessory action, its primary object being to try the possessory title to corporeal hereditaments and to recover immediate possession thereof.(d)

THE CARDINAL RULE regulating the action of ejectment is that the plaintiff must recover, if at all, on the strength of his own title and not on the weakness of his adversary's. In other words, a defect or imperfection in the defendant's title cannot make up for a want of title in the plaintiff. And this rule is not weakened by statutory provisions abolishing fictions in the action.(e)

NATURE OF TITLE NECESSARY.—The old rule that the equitable title will not support ejectment is modified by the

(b) *Ramey v. O'Byrne*, 121 Ga. 516.

The defendant is considered a trespasser whose wrong and trespass furnish the ground of the action. *Stiffan v. Zenst*, 10 App. Cas. D. C. 266, where it is said that while the action involves some of the effects of a proceeding *in rem* it is essentially a proceeding *in personam*, and therefore a judgment cannot be supported by constructive notice.

(c) *Butler v. Frontier Teleg. Co.*, 186 N. Y. 486; N. Y. C. C. P. §§ 1496-1531.

In New York, since the statute abolishing writs of right, ejectment has been the one great remedy for the settling of real property rights and for recovering the possession of real estate.

(d) *Steinman v. Vicars*, 99 Va. 595.

(e) *Moran v. Dentson*, 79 Conn. 325; *Phelps v. Nazworthy*, 226 Ill. 254; *Martin v. Kitchen*, 195 Mo. 477; *Spaulding v. Bartlett*, 55 N. H. 304; *Logan v. Ward*, 58 W. Va. 366; *Hogan v. Kurtz*, 94 U. S. 773.

So the plaintiff is not helped by the fact that the defendant is estopped to assert title. *DeLand v. Dixon Power etc. Co.*, 225 Ill. 212.

provision of the codes that the real party in interest may sue. (f)

And to the rule that the plaintiff must show a legal title in himself there is this exception—that prior possession is generally sufficient against a trespasser or one who enters without lawful right. (g) The reason for this rule, as stated by Judge Cooley is that “The peace of society requires that even an imperfect right should not be disputed and unsettled except on motion of someone having a better.” (h)

WHAT CAN BE RECOVERED?—As nothing can be recovered in ejectment except something of which the sheriff can deliver possession, it is a fundamental rule that the action will lie to recover only corporeal hereditaments; (i) as for example, a building or a part thereof, (j) two stalls in a barn, (k) land unduly occupied by a partition fence, (l) and land covered by tide water. (m)

It is a corollary of the last rule that this action cannot be maintained for an easement or for the privilege of using land. But in the interpretation of this secondary rule the decisions are not in harmony. (n)

(f) *Leatherwood v. Fulbright*, 109 N. C. 683.

(g) *Moss v. Chappell*, 126 Ga. 196; *Bagley v. Kennedy*, 85 Ga. 703; *Wilson v. Fine*, 40 Fed. 52.

Plaintiff must also have color of title. *Hubbard v. Godfrey*, 100 Tenn. 150.

(h) *Covert v. Morrison*, 49 Mich. 133.

(i) *Ezzard v. Findley Gold Mining Co.*, 74 Ga. 520; *Aiken v. Benedict*, 39 Barb. 400; *Burke v. Carlinville Water Co.*, 176 Ill. 555.

GROWING CROPS on the land in dispute belong to the successful party. *Harrod v. Burke*, (Kan.) 92 Pac. 1128.

(j) *Gilliam v. Bird*, 8 Ired. 280.

(k) *Patch & wife v. Keeler*, 27 Vt. 252.

(l) *Rose v. Linderman*, 147 Mich. 372.

(m) *City of Providence v. Comstock*, 27 R. I. 537.

(n) Thus, it has been held that ejectment will not lie to relieve a landowner from the burden of a cornice or eave projecting and overhanging from a building erected on adjoining land. *Aiken v. Benedict*, 39 Barb. 400; *Norwalk H. & L. Co. v. Vernam*, 79 Conn.

RIGHT TO POSSESSION NECESSARY.—The plaintiff must have the right to the present possession as well as the legal title.(o)

BUT ONE ACTUALLY IN POSSESSION cannot be plaintiff.(p)

WHO IS TO BE DEFENDANT?—The defendant must be in possession. The actual occupant, if there is one, must be made defendant.(q)

If there is no actual occupant the person claiming title must be sued.(r)

662. But the contrary has been held in other states. *Johnson v. Tribune Co.*, 91 Minn. 476.

So it is held in some states that one whose lands are overflowed by the backing up of water from the dam of a lower proprietor cannot recover in ejectment. *King v. Norfolk & W. R. Co.*, 99 Va. 665; *Conover v. Atlantic City Sewerage Co.*, 70 N. J. L. 315. But see *contra*, *Reynolds v. Munch*, 100 Minn. 114, where it was said that if the lower proprietor did not enable the sheriff to deliver possession by lowering the dam, he could be proceeded against in a suit to abate the nuisance. According to this the action of ejectment in Minnesota is not strictly a possessory action but a mere suit to determine rights. Again in *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, it was held that ejectment would lie to remove telephone wires strung above the plaintiff's land, there being no poles or supports in the land itself. It was said that it was perfectly feasible for the sheriff to deliver the possession by cutting the wires.

(o) *Richardson v. B. & D. D. R. Co.*, 89 Md. 126; *Covert v. Morrison*, 49 Mich. 133 (heirs and widow of a homesteader).

The right to shore privileges does not give a right to maintain ejectment against the owners of the beach. *Trustees of Southampton, v. Betts*, 163 N. Y. 454.

(p) *Steinman v. Vicars*, 99 Va. 595; *Peters v. Reichenbach*, 114 Wis. 209.

(q) So it is a complete defense that the defendant was on the land merely as servant or employe of another and without claiming title or the right to possession. *Danibee v. Hyatt*, 151 N. Y. 493.

But the Secretary of State who, by statute, is the guardian of state lands, is properly made defendant, as he actually has possession of the property, and the State must be proceeded against through an agent. *Tindal v. Wesley*, 167 U. S. 204. And see *Lucas v. Johnson*, *infra*.

(r) A corporation may be sued as occupant. *Lucas v. Johnson*, 8 Barb. 244.

WHAT CONSTITUTES POSSESSION.—Actual occupancy or residence upon the land is not a necessary element of possession. Any subjection of the property to the will and dominion of the defendant is sufficient. Asserting and maintaining a claim to the possession hostile to the true owner by acts which exclude him from the enjoyment of the property, subjects the party to the action.(s)

FICTIONS ABOLISHED.—At common law the plaintiff was bound to allege a lease to himself for a term of years. This necessity has disappeared since the statutes by which the fictions of the action were abolished. In framing a declaration under a statute it is not necessary to use the precise words and phrases of the statute. Any other words of equivalent import are sufficient.(t)

DESCRIPTION OF THE PROPERTY.—The property must be described in the declaration with convenient or reasonable certainty. By this is meant that the description must be such as is sufficient to identify the property so that the sheriff can deliver possession thereof.(u)

(s) *Phillips v. Phillips*, 107 Mo. 360; *Bell v. Foxen*, 42 Fed. 755.

(t) *Dunn v. Remington*, 9 Neb. 82.

COMPLAINT UNDER THE CODE.—The New York courts have declared explicitly the requisites of a good complaint under the statute of that state as follows: A statement of the real names of the parties to the action, a description of the premises sufficiently certain to enable the sheriff to deliver possession, a statement of the interest claimed in the premises by the plaintiff, that the plaintiff was in possession or entitled to the possession, that the defendant unlawfully entered and dispossessed the plaintiff or those under whom he claimed, and withholds possession, and sufficient allegations to show that the plaintiff is entitled to the rents and profits or damages. *Deering v. Riley*, 38 App. Div. 164, 168; *Jones v. Nichols*, 42 App. Div. 515. And see *Mash v. Bloom*, 114 Wis. 457.

(u) *Clark v. Knowles*, (Ga.) 58 S. E. 841; *Twogood v. Hoyt*, 42 Mich. 609; *Clerc v. Greer*, 49 W. Va. 102.

RESORT TO AIDS TO IDENTIFICATION.—The description is sufficient if, by the aid of a surveyor and persons knowing the monuments and

The "*convenient certainty*" with which, under a statute, the premises must be described in a declaration in ejectment, must not be determined with reference to the strict rules of common law special pleading. The certainty must be such as in the usual sense of the word is convenient. Some statutes use the term "common certainty." It is sufficient that the description is such that the sheriff may deliver possession of the proper premises if judgment calls for it.(v)

THE DECLARATION MUST SHOW A LEGAL TITLE in the plaintiff.(w) But a detailed statement of facts which might be put in evidence to support the title alleged is not a proper allegation of title.(x)

SO ALSO OUSTER OF THE PLAINTIFF, partial or complete, and retention of the possession by the defendant must be averred.(y)

THE GENERAL ISSUE appropriate to this action is "not guilty," and under it, generally speaking, the defendant may show anything which has a tendency to defeat the action; as, for example, adverse possession,(z) or usury in the consideration of the mortgage under which the plaintiff claims title.(a)

boundaries mentioned in the complaint the land can be found *Off v. Hettrichs*, 124 Wis. 440.

WAIVER OF DEFECTS.—The want of the mere formal parts of a description is waived by joining issue. *Black v. Black*, 74 Fed. 978.

(v) Convenient certainty, *Kemble v. Herndon*, 28 W. Va. 524, 531. It is incumbent on the plaintiff to establish his boundary. *Clay v. Sloan*, 104 Tenn. 401.

(w) *Sanborn v. Loud*, (Mich.) 113 N. W. 309; *Wood v. Praul*, 217 Pa. 293.

(x) *Brosnan v. White*, 136 Fed. 74. The complaint need not show how the plaintiff acquired title. *Overbaugh v. Outhout*, 90 Hun. 506.

(y) *Harris v. Butler*, (Fla.) 42 So. 186; *Nutter v. Hendricks*, 150 Ind. 605; *Butler v. Frontier Teleph. Co.*, 186 N. Y. 486; *Murray v. Briggs*, 29 Wash. 245.

(z) *Miller v. Beck*, '68 Mich. 76; *Oldig v. Fisk*, 53 Neb. 156.

(a) *Com. Title Ins. Co. v. Dokko*, 72 Minn. 229.

CHANGE OF TITLE.—It is held by some courts that, since the plain-

Statutory Modification.—In some of the states, however, this rule is modified by statutes which declare what is put in issue by this plea and enumerate the special pleas which the defendant may file. (b)

THE JUDGMENT must follow the complaint and must be restricted to the land and estate described therein, (c) unless, as may be the case, the verdict is special, and for a portion only of the land described in the complaint or declaration, in which case the judgment can be for such portion only. (d)

RENTS AND PROFITS.—Formerly, and at this day in some states, there must be a separate action to recover rents or profits. (e)

But under some statutes the rents and profits to the termination of the suit—except for the time, if any, when the plaintiff slept upon his rights—are included in the damages if claimed in the complaint. (f)

EXECUTION.—When it comes to executing the judgment the plaintiff points out the property to the sheriff who puts him in possession. The sheriff, in executing the judgment, exercises purely ministerial functions, and cannot look to the court for instructions. (g)

tiff in establishing his case must show title at the time of the trial, a change of title during the pendency of the action may be shown under the general issue, it not being necessary, though permissible, to plead this *puis darrein continuance*. *Etowah Min. Co. v. Doe ex dem. Carlisle*, 127 Ala. 663. See *Spratt v. Price*, 18 Fla. 289.

(b) *Sheldon v. Van Vleck*, 106 Ill. 45; *Village of Shumway v. Leturno*, 225 Ill. 601.

(c) *Horne v. Carter's Admrs.*, 20 Fla. 45; *Bricken v. Cross*, 140 Mo. 166.

(d) *Cole v. McLaughlin*, 170 Ill. 278. And see *Hamilton v. Rogers*, 126 Ga. 27.

(e) *Herreshoff v. Tripp*, 15 R. I. 92.

(f) *Ramey v. O'Byrne*, 121 Ga. 516; *Anderson v. Acheson*, (Ia.) 110 N. W. 335; *Pfeffer v. Kling*, 58 App. Div. 179; *Willis v. McKinnon*, 178 N. Y. 451.

(g) *Huntington's Devisees v. Taylor*, 156 Fed. 700.

TRESPASS TO TRY TITLE.—Trespass to try title is the name given to an action provided by the statutes of some of the states as a substitute for the action of ejectment. Whenever ejectment would lie at common law trespass to try title will lie under these statutes. It was intended as a remedy by which could be determined every character of conflicting titles and disputed claims to land, irrespective of the fact of its actual occupancy or mere pedal possession. The action may be maintained upon the equitable as well as upon the legal title. As in ejectment the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's. By statutory provision the trial is to be conducted conformably to the principles of trial by ejectment except as modified by express statute. Rents and profits may be recovered in the action if claimed in the petition. Under the plea of "not guilty" the defendant may show any lawful defense to the action except the defense of limitation, which he must plead specially.(h)

(h) This action is in common use in Texas. See Sayle's Texas Civil Stat., Art. 5248 *et seq.*; *Jaggers v. Stringer*, 106 S. W. 151; *Hays v. The T. & P. R. Co.*, 62 Tex. 397; *Hardy v. Beaty*, 84 Tex. 562; *Titus v. Johnson*, 50 Tex. 224, 238.

The action was formerly in use in Alabama and in South Carolina. It was abolished, in the former state by the Code of 1852. And see, *Slusher v. Pennington*, (Ky.) 104 S. W. 354.

CHAPTER VI.

DEBT.

DEFINITION.—Debt was the appropriate action—and, until assumpsit came into use, was the only action—for the recovery of a sum of money, (a) certain in amount or capable of being reduced to a certain amount. (b)

DEBT IS DISTINGUISHED FROM ASSUMPSIT in this, that it is founded on a contract or statutory liability while assumpsit is founded on a promise. (c)

FORM OF CONTRACT IMMATERIAL.—If the sum is certain the action of debt can be sustained irrespective of the form of the contract. The real question is whether the claim of the plaintiff is for a sum certain in the nature of a debt or merely for damages for a breach of contract. (d)

The action will lie on a simple contract, (e) a specialty (f) or a matter of record. (g)

(a) *Mix v. Nettleton*, 129 Ill. 245, where the sum named was payable in county orders.

(b) *Cassady v. Laughlin*, 3 Blackf. 134; *Mitchell v. McNab*, 58 Me. 506.

(c) *Houghton v. Stowell*, 28 Me. 215, 217.

However debt will now lie generally for a *quantum meruit* or *quantum valebant*. *Seretto v. Railway*, 101 Me. 140.

(d) *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

(e) *Portland v. Atlantic & St. Lawrence R. Co.*, 66 Me. 485.

(f) *Leland v. Barry*, 69 Ill. 348; *Mayor v. Butler*, 1 Barb. 325; *McCardell v. Williams*, 19 R. I. 701.

(g) *Hilton v. Guyot*, 159 U. S. 113.

An action of debt may be maintained to recover upon a decree of a court of chancery awarding alimony whether as a single stated amount or as an accruing allowance. *Wagner v. Wagner*, 26 R. I. 27.

STATUTES EXTEND SCOPE.—The scope of the remedy has been considerably extended by statute, and in some states debt is the proper action to recover a forfeiture under a penal statute. *(h)*

THE GENERAL ISSUE is *nil debit*, on simple contract; *(i)* *non est factum*, on a specialty; *(j)* *nul tiel record*, in debt on a domestic judgment; *(k)* *nil debit*, in debt on a foreign judgment which is only evidence of indebtedness. *(l)*

THE JUDGMENT.—The plaintiff may have judgment for less than the sum named in the declaration. *(m)*

At common law the judgment could not be for more than the sum claimed in the declaration, but this has been changed in some states by statute. And in an action for a statutory penalty the plaintiff may recover a substantial sum, though in the declaration only a nominal amount is claimed. *(n)*

(h) And it is no objection that the amount may depend on the finding of a jury. *Scammon v. Small*, 29 N. H. 280, 288; *Orme v. Roberts*, 51 N. H. 110. And see, *Higdon v. Kennemer*, 120 Ala. 193; *Robley v. Colwell*, 69 Ill. App. 272; *U. S. v. Younger*, 92 Fed. 672.

By an early statute in Pennsylvania the plaintiff could bring an action of debt to recover on any debt one by "bond, note, book account, rent, damage or assumption," thus covering almost all the cases in which *assumpsit* or covenant would otherwise have been the appropriate remedy. *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. 295.

(i) *Baum v. Tonkin*, 110 Pa. 569. *Non assumpsit* would be improper. *Lancaster v. Lancaster*, 29 Ill. App. 510.

(j) *Gebhart v. Francis*, 32 Pa. 78.

(k) *Wood v. Agostines*, 72 Vt. 51.

(l) *Tourigny v. Houle*, 88 Me. 406; *Hilton v. Guyot*, 159 U. S. 113.

(m) *Mayor v. Butler*. 1 Barb. 325; *Hughes v. Union Ins. Co.*, 8 Wheat. 294.

(n) *Müller's Fire Ins. Co. v. People*, 170 Ill. 474.

CHAPTER VII.

COVENANT.

WHEN THE ACTION LIES.—The action of covenant lies when one claims unliquidated damages for the breach of a promise contained in a written instrument sealed by the defendant, or by his authority.(a)

CANNOT BE WAIVED IN FAVOR OF ASSUMPSIT.—If one has a remedy by action of covenant he cannot waive it and bring assumpsit.(b)

DISTINGUISHED FROM DEBT.—And covenant differed from debt in that the latter was the proper action when the plaintiff sought to recover a sum certain. But this has been changed by some modern statutes, under which a sum certain may be recovered by either covenant or debt.(c)

NO PARTICULAR FORM OF WORDS is necessary to support

(a) *Haynes v. Lucas*, 50 Ill. 436; *Walker v. Kesner*, 86 Ill. App. 244; *Manning v. Perkins*, 86 Me. 419.

In *Morgan v. Town of Guttenberg*, 40 N. J. L. 394, the declaration was in debt. It appeared from the statement of the contract that there was a stipulation on the part of the town "to use diligence in making and collecting of said assessment;" and a second stipulation that it would pay the specified sum after an appointed period, "upon thirty days' notice of default." A breach was laid on each of these conditions. It was held that the breaches could not be joined in this action. There was no agreement that on the non-performance of the former of these stipulations the money due is to become payable, so for compensation on such non-performance the plaintiff could claim unliquidated damages only. "For the breach of such a stipulation, the action must be covenant and not debt."

(b) *McKay v. Darling*, 65 Vt. 639.

(c) *Baldwin v. Emery*, 89 Me. 496; *Douglas v. Hennessey*, 15 R. I. 272, 282. And see *Outtoon v. Dulin*, 72 Me. 536.

this action, it being sufficient if the words used import an agreement. *(d)*

FORM OF ALLEGATION.—It is not sufficient to allege that the defendant covenanted: there must be either a direct allegation of sealing by the party to be charged, or the use of a technical word, such as deed or indenture, which in itself imports a seal. *(e)*

THE BREACH. The only breach that can be set up as the basis of recovery is the breach of a covenant contained in the written contract. *(f)*

The breach may be alleged according to the legal effect, or in the negative of the terms of the covenant. It is safer to set it out according to its form in the deed. But this direction must be qualified by the caution that if the words of the covenant, when separated from their context, convey a different meaning than when used in connection with the rest of the instrument, the breach must not be assigned in the words of the covenant. *(g)*

QUALIFICATION OF THE COVENANT MAY BE SHOWN.—Matter qualifying the covenant not set out in the declaration may be shown under the plea of *non est factum*. *(h)*

THE SEAL is the important thing: the signature is unimportant if it is shown that the defendant adopted the seal as his own. *(i)*

Where by statute the distinction between sealed and unsealed instruments is abolished, this action can be maintained on any writing intended to operate as a deed. At common law a seal was essential to a deed, but under such statutes this is no longer necessary. The test is, Is the instrument a

(d) *Ewing v. Gordon*, 49 N. H. 444, 455.

(e) *Wineman v. Hughson*, 44 Ill. App. 22.

(f) *Merriman v. Bush*, 116 Pa. 276.

(g) *C. M. & St. P. R. Co. v. Hoyt*, 44 Ill. App. 48.

(h) *Howell v. Richards*, 11 East 633.

(i) *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

deed? The rule and the reason thereof were explained by Chief Justice Campbell thus: "It is only because a deed at common law required a seal that covenant has been declared to lie upon a covenant or agreement under seal. It is the question whether the instrument was a deed or not that governs all sealed instruments and deeds * * * At common law the seal alone was the test of the existence of a deed. Our statute contemplates a signature as equally necessary. The statute indicates that some other thing than a seal may be considered, and this can only be the intention of the parties as found in the instrument itself, and the purpose it was intended to serve."(*j*)

COVENANT WILL NOT LIE ON A DEFEASANCE.—The action will not lie on words inserted in an instrument by way of a condition or defeasance by performance of some collateral act. (*k*)

ACTION CANNOT BE ENLARGED BY PAROL EVIDENCE.—The action cannot be enlarged or modified by proof of a parol addition to the deed sued upon. (*l*)

PRIVITY between the parties is necessary to the maintenance of the action. (*m*) At common law covenant could be maintained by the covenantee, only, or his privy, (*n*) but under the codes, and pretty generally by statute, the real party in interest may sue. (*o*)

THE GENERAL ISSUE.—Strictly speaking there is no general issue. *Non assumpsit* and *nil debet* are improper; and while *non est factum* is proper, it puts in issue only the execution of the covenant in a lawful manner. (*p*)

(*j*) *Jerome v. Ortman*, 66 Mich. 668.

(*k*) *Douglas v. Hennessy*, 15 R. I. 272; *U. S. v. Brown*, 1 Paine 422.

(*l*) *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646.

(*m*) *Knowles v. Knowles*, 26 R. I. 534.

(*n*) *Webster v. Fleming*, 73 Ill. App. 234.

(*o*) *Johnson v. McClung*, 26 W. Va. 659.

(*p*) *Clark v. Harmer*, 5 App. (D. C.) 114.

CHAPTER VIII.

ACCOUNT.

PURPOSE OF THE ACTION.—Though obsolete in England the action of account is in use in some of the states to compel an accounting(*a*) where no formal statement of accounts has been made.

ENLARGEMENT BY STATUTE.—By statute the action has been enlarged so that it will lie on book accounts, (*b*) and it may be brought by one tenant against another. (*c*)

At common law the action could not be maintained between partners where there were more than two partners, (*d*) but statutes allow the action among three or more partners. (*e*)

ONE ITEM UNADJUSTED will defeat a plea of full accounting. (*f*)

THE ISSUE in this action is not whether upon a final settlement the account is balanced, but whether there shall be an accounting.

THE JUDGMENT, if found for the plaintiff, is *quod computet*—that the defendant ought to account. The adjusting of the balance is left to auditors. This judgment is interlocutory and determines nothing beyond the liability to account. (*g*)

(*a*) See *Kemp v. Merrill*, 92 Ill. App. 46; *Field v. Brown*, 146 Ind. 293.

(*b*) *Garrity v. Hamburger Co.*, 136 Ill. 499.

(*c*) *Barnum v. Landon*, 25 Conn. 137.

(*d*) *Lacon v. Davenport*, 16 Conn. 241.

(*e*) *Park v. McGowen & Norton*, 64 Vt. 173.

(*f*) *Morgan v. Adams*, 37 Vt. 233.

(*g*) *Hawley v. Burd*, 6 Ill. App. 454.

PROCEEDINGS BEFORE AUDITOR.—There can be no plea in bar before the auditor. That plea must be put in before the interlocutory judgment.(h)

The auditor may report a balance due the plaintiff or the defendant, or the account may be exactly balanced, and final judgment will go accordingly.(i)

(h) *Day v. Lockwood*, 24 Conn. 194; *Black v. Nichols*, 68 Me. 227; *Closson v. Means*, 40 Me. 337.

(i) *Hawley v. Burd*, *supra*; *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99.

CHAPTER IX.

DETINUE.

DEFINITION.—Detinue is a personal action which lies to recover only specific property(*a*) of some value(*b*) which has been wrongfully withheld from the plaintiff.(*c*)

DISTINGUISHED FROM TROVER AND REPLEVIN.—In trover the property in the chattel involved vests in the defendant from the commencement of the action, whereas in detinue it vests only on payment of the alternative value assessed by the jury.(*d*)

At common law detinue differed from replevin much as trover differed from trespass. Trespass *de bonis asportatis* was brought to recover, not the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property, when the original taking was lawful and proper. So replevin was originally brought to recover the possession of a

(*a*) *McFadden v. Crawford*, 36 W. Va. 671.

(*b*) *Whitfield v. Whitfield*, 44 Miss. 254.

(*c*) *Dame v. Dame*, 43 N. H. 37.

IN ALABAMA the statutory action of detinue is virtually equivalent to the common law action of the same name.

IN GEORGIA the action of trover may be resorted to in any case where, at common law, either trover, detinue or replevin would lie. *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760.

IN WEST VIRGINIA replevin is abolished and detinue has been enlarged so as to cover the ground. *Robinson v. Woodford*, 37 W. Va. 377.

(*d*) *Whitfield v. Whitfield*, *supra*.

chattel in specie when the original taking was wrongful, and detinue when the original taking was lawful. Accordingly the declaration in trover was similar to that in detinue. (e)

ESSENTIALS TO THE MAINTENANCE OF THE ACTION.—To allow the maintenance of detinue it is necessary, that, 1, the property in some particular chattel, capable of identification and delivery must be vested in the plaintiff, 2, the plaintiff must have in such chattel the general or special property; 3, he must have the right to immediate possession; 4, the defendant must have wrongfully detained the goods. So that, to support the action, the plaintiff must prove, first, such title as will draw to it the possession, or, second, the right to the immediate possession, and, third, the detainer or possession in defendant. (f)

Formerly, detinue could be maintained only when the possession of the defendant was originally lawful; but it has long been the rule that the action may be sustained when the possession was tortiously obtained by the defendant. (g)

THE GIST OF THE ACTION.—So the action is no longer considered an action *ex contractu*, the gist of the action being the wrongful detention. (h)

TITLE.—As against one who wrongfully dispossessed the plaintiff, or one who cannot show a superior title, the plaintiff need establish only a prior possession. (i)

POSSESSION.—The action will fail unless the defendant has, or has had, actual possession, constructive possession being insufficient. (j)

A possession shown to have once existed is presumed to

(e) *Dame v. Dame*, 48 N. H. 37.

(f) See *Griswold v. Manning*, 67 App. Div. 372; *Hardaway v. Jones*, 100 Va. 481.

(g) *Whitfield v. Whitfield*, *supra*.

(h) *Jesse French Piano & Organ Co. v. Bradley*, 138 Ala. 177; *Whitfield v. Whitfield*, *supra*; *Robb v. Cherry*, 98 Tenn. 72.

(i) *Jones v. Anderson*, 76 Ala. 427.

(j) *Burns Bros. v. Morrison*, 36 W. Va. 423.

continue.(*k*) And, as no one can take advantage of his own wrong,(*l*) the action can be maintained against a bailee who has parted with the possession prior to the commencement of the suit.(*m*)

THE PROPERTY MUST BE IN EXISTENCE.—But it has been held that the action cannot be maintained if the thing in suit ceased to exist before the commencement of the action.(*n*)

THE GENERAL ISSUE appropriate to the action is *non detinet*, and it puts in issue the fact of the possession by the defendant and the right of the plaintiff to recover.(*o*)

THE DAMAGES should amount to full compensation for the value of the property at the time of the taking with interest to the time of trial. But the measure of damages depends on all the circumstances of the case, and if malice or fraud or wilful wrong intervene, the jury may assess such additional damages as they see fit.(*p*)

JUDGMENT is in the alternative for the recovery of the property or its value as assessed, and damages for the detention.(*q*)

And when the plaintiff has only a special property in the thing sued for, an alternative judgment may be rendered for the value of his interest.(*r*)

(*k*) *Downs v. Bailey*, 135 Ala. 329.

(*l*) *Faulkner v. First Nat. Bank*, 130 Cal. 258, and cases cited.

(*m*) The plea of *non detinet* operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein. So that under this plea if the property is lost to the defendant during the pendency of the suit the plaintiff may have the alternative judgment for damages. In such a case the defendant may plead *puis darrein continuance*. *Arthur v. Ingels*, 34 W. Va. 639.

(*n*) *Caldwell v. Fenwick*, 2 Dana 332.

(*o*) *Carlisle v. People's Bank*, 122 Ala. 446.

(*p*) *Whitfield v. Whitfield*, 40 Miss. 352.

(*q*) *Robinson v. Woodford*, 37 W. Va. 377.

(*r*) *Hundley v. Galloway*, 45 W. Va. 516.

CHAPTER X.

REPLEVIN.

DESCRIPTION OF THE ACTION.—Replevin is an action *ex delicto*, (a) and is in form an action for damages for the illegal taking and detaining of goods and chattels.

Under the procedure authorized by the statute of Marlbridge (52 Hen. III, ch. 21), there was no original writ because the action was not commenced in the superior courts but was removed there from the county court. A party whose goods had been distrained could have them redelivered to him, upon making complaint to the sheriff, by giving a bond to prosecute the action against the distrainer to determine the legality of the distress. And this was formerly the only use of the action.

UNDER STATUTES.—In all states, probably, the action is regulated by statute, and generally it can be maintained only when authorized by statute. (b)

And in framing the declaration or complaint the provisions of the statute must be strictly observed. (c)

THE ORIGINAL TAKING.—At common law the original taking must have been tortious, but under some statutes an unlawful detention is sufficient. (d)

(a) *Freeman v. Trummer*, (Oreg.) 91 Pac. 1077.

(b) See *Krasmopolski v. Paxton*, 58 Miss. 581; *Eddy v. Davis*, 35 Vt. 247.

In *Griffin v. Long I. R. Co.*, 101 N. Y. 348, it was said that the action to recover a chattel, as regulated by the code, is substantially the action of replevin.

(c) *J. I. Case Threshing Mach. Co. v. Rosso*, (Neb.) 110 N. W. 686.

(d) There was the exception at common law of cattle distrained *damage feasant* where a tender was made. *Dame v. Dame*, 43 N.

REPLEVIN IN THE *CEPIT*.—The form of the action called replevin in the *cepit* lies only where trespass might have been brought, and the principal question relates to the tortious taking. *(e)*

This form of the action may be maintained though the defendant has parted with the possession of the goods. *(f)*

REPLEVIN IN THE *DETINET* is the proper form when the taking was lawful, *(g)* and the gist of the action is the detention. *(h)* A demand for a return of the goods is a prerequisite to the maintenance of the action in this form; that is to say, where the possession was originally lawful. *(i)* Where, however, the taking is proved to have been wrongful, that is to say, in replevin in the *cepit* or the statutory substitute, it is not necessary to prove a demand. *(j)*

The failure to make a demand does not prejudice the plaintiff's case if he shows that a demand would have accomplished nothing. *(k)*

THE PROPERTY must be in existence and in the defendant's possession when the writ is sued out. *(l)*

H. 37. And see *Baird v. Grand Rapids School Furniture Co.*, 98 Mich. 457; *Moore v. Trout & Goff*, 2 Del. Co. Rep. 13.

(e) *Barrett v. Warren*, 3 Hill 348.

(f) *Hoffman v. Markham*, 88 Hun, 18.

(g) *Randall v. Cook*, 17 Wend. 53.

(h) *Charpentier v. Bresnahan*, 74 Mich. 48; *Blue Valley Bank v. Clement*, 20 Neb. 294; *Rowe v. Hicks*, 58 Vt. 18; *Boswell v. First Nat. Bank*, (Wyo.) 92 Pac. 674.

(i) *Ingalls v. Bulkley*, 13 Ill. 315; *Ellis v. Simpkins*, 81 Mich. 1.

(j) *Adams v. Wallace*, 122 Ill. App. 550; *Robinson v. Shutzley*, 75 Ind. 461; *Jessup v. Miller*, 1 Keyes 321; *Brown v. Lewis*, (Oreg.) 92 Pac. 1058.

(k) *Churchill v. Moore*, (Cal.) 88 Pac. 290.

(l) *Lovell v. Hammond Co.*, 66 Conn. 500; *Reid, etc., Co. v. Ferris*, 112 Mich. 693; *Kierbow v. Young*, (S. Dak.) 107 N. W. 371.

This rule is modified where the defendant has transferred the property wrongfully without the plaintiff's knowledge. *Andrews v. Hoerlich*, (Wash.) 91 Pac. 772.

PLAINTIFF MUST RELY ON HIS OWN TITLE.—If the plaintiff recovers it must be on the strength of his own title. (*m*)

REPLEVIN IS A POSSESSORY ACTION.—Where the plaintiff alleges the title to be in him, a trial upon the merits determines the title as against the defendant. (*n*) But replevin is a possessory action, and a right to the possession of the property is, in general, all that the plaintiff need show. (*o*) And one who has possession of the goods is entitled to keep them as against anyone not having a better title. (*p*)

PURPOSE OF THE ACTION.—The principal purpose of the action is to recover the goods themselves, (*q*) and, generally, trespass and trover are concurrent remedies. (*r*)

And the word “*goods*” in this connection has always been treated as applying to animate as well as to inanimate property. (*s*)

The possessor of land may bring replevin for chattels severed from the freehold, and, as the ownership of land draws to it the constructive possession, the owner may bring replevin for chattels thus severed where there is no adverse posses-

(*m*) *Kelly v. Lewis*, 38 Colo. 18, 88 Pac. 388; *Frank v. Symons*, 35 Mont. 56.

(*n*) *Farnam v. Chapman*, 60 Vt. 338.

Replevin may be maintained by a trustee in bankruptcy, but he must recover through the bankrupt's title, so declarations of the bankrupt against his title, made while the goods were yet in his possession, are admissible against the trustee. *Mower v. McCarthy & Brodie*, 79 Vt. 142, 155.

(*o*) *Rose v. Cash*, 58 Ind. 278; *Rose v. Eaton*, 77 Mich. 247; *Cartwright v. Smith*, 104 Tenn. 689; *Tittmore v. Labounty*, 60 Vt. 624; *Midland Contr. Co. v. Toledo Foundry & M. Co.*, 154 Fed. 797.

But in some jurisdictions the plaintiff must show both property and the right to possession. *Field v. Fletcher*, 191 Mass. 494.

(*p*) *Odd Fellows' Hall Asso. v. McAllister*, 153 Mass. 292, 11 L. R. A. 172, note, and cases cited therein.

(*q*) *Herdic v. Young*, 55 Pa. 176.

(*r*) *Sawtelle v. Rollins*, 23 Me. 196.

(*s*) *Eddy v. Davis*, 35 Vt. 247; *B. & O. R. Co. v. Hamilton*, 16 Fed. 181.

sion. But the owner cannot bring replevin for chattels severed from land in the adverse possession of the defendant or of a third person, for this action is not the proper means of determining the title to real property.(t) So one in adverse possession of land and claiming under color of title may maintain replevin for property severed therefrom.(u) So at common law, or under statute, it has been held that the action will lie to recover promissory notes,(v) money in specie if it can be identified,(x) a building already severed from the land,(y) growing crops,(z) or any property severed from the realty so as to have become personalty.(a)

But the action cannot be resorted to to recover possession of property which can be used only in violation of law or the purpose of which is *contra bonos mores*.(b)

And replevin is not a proper action to recover goods in the possession of an officer under a valid process,(c) or under an order of a court.(d)

DESCRIPTION OF THE PROPERTY.—The warrant of the sheriff always specified the goods to be replevied. And this practice has been followed in the procedure provided by some statutes.(e)

(t) *Page v. Fowler*, 28 Cal. 605; *Anderson v. Hapler*, 34 Ill. 436.

(u) *Wheeler v. Clark*, 114 Tenn. 117, 69 L. R. A. 732, note, and cases cited.

(v) *Bush v. Groomes*, 125 Ind. 14.

(x) *Hamilton v. Clark*, 25 Mo. App. 428; *Sager v. Blain*, 44 N. Y. 445.

(y) *Luce v. Ames*, 84 Me. 133.

(z) *Garth v. Caldwell*, 72 Mo. 622.

(a) *Richbourg v. Rose*, (Fla.) 44 So. 69.

(b) *Robertson v. Porter*, (Ga.) 57 S. E. 993; *J. B. Mullen & Co. v. Mosley*, (Utah) 90 Pac. 986.

(c) *Lemp v. Fullerton*, 83 Ia. 192, 13 L. R. A. 408, and cases cited in note; *Lepple v. Hawk*, 51 N. J. L. 208.

(d) *Read v. Brayton*, 72 Hun 633.

(e) *Snedeker v. Quick*, 11 N. J. L. 179.

It is held that the property is sufficiently described if the officer by the use of ordinary intelligence, and with the aid usually afforded by the plaintiff, can identify the property. (f)

(f) *Pingree v. Steere*, 68 Mich. 204; *Peterson v. Fowler*, 76 Mich. 258.

CHAPTER XI.

TRESPASS.

DEFINITION.—Trespass was a writ by which the plaintiff claimed damages for an injury committed with violence either actual or implied. Violence is implied by the law where the injury is direct and immediate, and is committed on the person or tangible and corporeal property of the plaintiff; as where one enters wrongfully, though peaceably, upon the plaintiff's land. (a)

INTENT.—Mere intent or mental attitude independent of conduct does not constitute trespass. (aa)

Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. (b)

THE INJURY;—TRESPASS AND CASE DISTINGUISHED.—There can be no recovery unless there was some injury however slight; and the injury must be direct and immediate, not consequential.

Where the wrong complained of is committed with force direct and intentional, the action must be trespass and not case. Trespass on the case is the proper remedy where the injury is consequential. (c)

(a) See 3 Cooley's Black. Com. 408, *et seq.*; *Smith v. Rhode Island Co.*, 26 R. I. 24.

(aa) *Estey v. Smith*, 45 Mich. 402.

(b) *Cubit v. O'Dett*, 51 Mich. 347.

(c) *Taylor v. Smith*, 104 Ala. 537; *Munal v. Brown*, 70 Fed. 967.

The distinction was illustrated by Le Blanc J., in *Leame v. Bray*, 6 East 593, 602, by the example of a man throwing a log into the highway. If at the time of its being thrown it hit any person, or

SPECIES OF THE ACTION.—If the action is for an injury to the person it is called trespass *vi et armis*, simply. But actionable trespass may be to the person, to personal property, or to real property. (d)

Species of this action are trespass *de bonis asportatis* and trespass *quare clausum fregit*.

TRESPASS DE BONIS ASPORTATIS, as may be gathered from the name itself, lies for the wrongful taking and carrying away of chattels. (e)

if it is put down in the most quiet way upon a man's foot, it is trespass; but if one afterwards came along and is injured by falling over the log, it is case irrespective of the violence with which it was thrown into the road.

"In all cases where goods are taken and retained it is evident that two wrongs are done which are logically separable. The taking of the goods or chattels unlawfully is a forcible wrong or trespass, and a detention of them is a neglect of duty not involving a direct exercise of force. Either is a good cause of action. So the plaintiff may waive the trespass and sue in case for the conversion, or in some cases he may even waive the whole wrong to his possession, and sue in assumpsit for the value of the goods. But the law is not so when the only unlawful act is a direct and forcible intrusion upon real estate in the plaintiff's possession. In such a case the gist of the action is the injury to the land, any other injury being regarded as an aggravation." *Niles v. Brown*, 25 R. I. 537, and cases cited. Punitive damages may be awarded on a showing of malice. *Miller v. Rambo*, 73 N. J. L. 726.

In further illustration of direct and proximate injuries, see *Engle v. Simmons*, (Ala.) 41 So. 1023, 7 L. R. A., N. S. 96; *Hathaway v. Osborne*, 25 R. I. 249.

But in some states, as in Maine, the distinction between trespass and case has been abolished.

(d) *Johnson v. Castleman*, 2 Dana 377; *Percival v. Hickey*, 18 Johns. 257.

(e) *Wadleigh v. Janvrin*, 41 N. H. 503 (trespass for the carrying away of a chattel severed from the realty, where the plaintiff waived the entry as he had a right to); *White Water, etc., Co. v. Dow, Smith* (Ind.) 162 (a ship); 2 Bouvier's Law Dictionary.

AS TO THE CARRYING AWAY.—It is sufficient if the defendant, by acts of ownership, has excluded the real owner from the enjoyment of the property. *Dexter v. Cole*, 6 Wis. 319.

It was not a bar to the action that the defendant returned the goods to the owner, who accepted them, though this might operate in mitigation of damages. *(f)*

TRESPASS QUARE CLAUSUM FREGIT is a possessory action which lies for an injury to real property committed with force. *(g)*

In trespass *quare clausum fregit* the gist of the action is the breaking and entering. *(h)*

ACTUAL OR CONSTRUCTIVE POSSESSION.—In order to recover the plaintiff may show actual possession or title which gives constructive possession. *(i)*

ENTRY ON LAND IS A TRESPASS.—Every entry upon the land of another without authority express or implied, is a trespass. *(j)*

THE DEGREE OF FORCE is immaterial. Force is implied from an unlawful entry upon land, *(k)* for repeated entries might be shown as evidence of title. *(l)* Therefore, in contemplation of law, every man's land is surrounded, if not by a visible and material fence, then by an ideal boundary. *(m)*

WHEN ENTRY IS MADE BY AUTHORITY or license given to anyone by law, and he abuses it he is liable as a trespasser

(f) *Loewenberg v. Rosenthal*, 18 Oreg. 178.

(g) *I. C. R. R. Co. v. Hatter*, 207 Ill. 88; *Lawry v. Lawry*, 88 Me. 482; 3 Cooley's Black. Com., 408, et seq.

(h) *Rucker v. McNeely*, 4 Blackf. 179; *Hunnewell v. Hobart*, 42 Me. 565; *Agnew v. Jones*, 74 Miss. 347.

(i) *Powers v. Hatter*, (Ala.) 44 So. 859.

(j) *Hall v. Alford*, 114 Mich. 165 (anchoring a boat in shallow water); *Ketcham v. Newman*, 141 N. Y. 205 (where a contractor entered upon land to shore up a building); *Norvell v. Gray's Lessee*, 1 Swan 96.

(k) *Agnew v. Jones*, 74 Miss. 347; *Febes v. Tiernan*, 1 Mont. 179.

(l) *Bragg v. Laraway*, 65 Vt. 347.

On the other hand more than necessary force used by the owner of land in removing a trespasser renders him liable in trespass. *Green v. Buckingham*, 122 Ill. App. 631.

(m) 3 Black. Com. *209; *Bileu v. Paisley*, 18 Oreg. 47; *Wood v. Snider*, 187 N. Y. 28.

ab initio; but this is not so where the entry is by authority or license given by the party.(n)

LIBERUM TENEMENTUM is a good plea in bar to an action of trespass *quare clausum fregit*, and is effectual when pleaded by the owner of land having the right of entry in an action brought by one in possession.(o)

THE GENERAL ISSUE, not guilty, controverts only what the plaintiff is bound to prove.(p)

(n) *Six Carpenters' Case*, 8 Coke 146. *Contra, Haines v. Haines*, 104 Md. 208.

(o) *Stillwell v. Duncan*, 103 Ky. 59.

(p) *Chicago Title & Trust Co. v. Core*, 223 Ill. 58.

CHAPTER XII.

TRESPASS ON THE CASE.

TRESPASS ON THE CASE, or case, is a generic term which embraces many species of action, the most important of which are *assumpsit* and *trover*. Trespass on the case rests upon the statute of Westminster 2 (13 Ed. I, ch. 24) by which it was provided that "as often as it shall happen in the chancery that in one case a writ is found, and in a like case, falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the Parliament." This then was a remedy provided to supply the deficiency in legal remedies, and was equitable in its nature. As the case arose the writ was provided. If the state of facts presented was like a case in which a writ of trespass already existed, the clerks in chancery themselves framed a writ to fit it; if the case was entirely new it was referred to Parliament which provided the writ. Though long resisted, it gradually came to be applied "to almost every instance of injustice not remedied by any other process," (a) the particular injustice being called a tort or wrong. In the course of time many of these writs were framed, and then, to distinguish them from other actions, they were termed writs of trespass on the case. (b)

(a) *Carroll v. Green*, 92 U. S. 509, 513, 514.

(b) "The action on the case," said Hall, J., in *Griffin v. Farwell*, 20 Vt. 151, 153, "is peculiarly adapted to the redress of injuries

THE INJURY.—As has been pointed out heretofore, action on the case is improper, and will not lie, where the injury is direct and accompanied with force.(c) But the difference between trespass and case has so far become matter of form that it is held in some states that the form of action could be changed by amendment.(d) And in some states the distinction is abolished by statute;(e) and this, of course, is the effect of the general code provision abolishing the distinction between forms of action.

NATURE OF THESE ACTIONS.—Though it was not necessary to the maintenance of the action that there should be any moral turpitude in the act complained of, actions on the case are actions *ex delicto*, with the exception of *assumpsit*.(f)

arising from any new relations, in which parties may be placed by the varying changes in society and business, whether arising from statutory provisions, or otherwise. It is held to lie, in general, where one man sustains an injury by the misconduct of another, for which the law has provided no other adequate remedy." And see *Ashby v. White*, *Ld. Raym.* 938; *Pasley v. Freeman*, 3 T. R. 63; *Sharp v. Curtiss*, 15 Conn. 526, 532; *Doremus v. Hennessy*, 62 Ill. App. 391, 406-407; *Owen v. Weston*, 63 N. H. 599.

(c) *Wood v. Railroad Co.*, 81 Mich. 358. And see *supra*, TRESPASS.

(d) *Carleton v. Cate*, 56 N. H. 130, 136.

(e) In *Blalock v. Randall*, 76 Ill. 224, 228, it was said that though "the statute does away with the technical distinction between the two forms of action, it does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy" in cases in which these were the appropriate writs. And see, *Wood v. Mich., etc., R. Co.*, 81 Mich. 358; *Duffield v. Rosenzweig*, 144 Pa. 520; *Barnum v. B. & O. R. Co.*, 5 W. Va. 10.

(f) *Hathorn v. Calef*, 53 Me. 471, 476-477.

ASSUMPSIT, though in its origin a form of trespass on the case, is sometimes treated as a distinct form of action. Thus in *Royce, Allen & Co. v. Oakes*, 20 R. I. 418, 420, the court said that "though trespass on the case was an exceedingly broad and comprehensive form of action," yet "in a case like the one set out the common law has provided an adequate remedy in an action of *assumpsit*; and to permit the plaintiffs to maintain their action of trespass on the case, would, in effect, be to abolish the distinction between actions sounding in tort, and those sounding in contract."

ALL THE FACTS SET OUT IN THE DECLARATION.—In an action of trespass on the case the plaintiff set out all the facts constituting his cause of action. Therefore, under the codes, every action is, in effect, an action on the case. (*g*)

(*g*) *Hathorn v. Calef*, 53 Me. 471.

"To support an action on the case the facts, well pleaded, must show an invasion of a legal right of the plaintiff, either with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury." *Sprague v. Fletcher*, 67 Vt. 46, per Ross, C. J.

It was this peculiarity—that the facts of the particular case were all set out—which gave rise to the name trespass on the case. 3 Cooley's Black. Com. 122; and *supra*.

CHAPTER XIII.

ASSUMPSIT.

DEFINITION.—Assumpsit is in its nature equitable, and in its origin a writ of trespass on the case, and is the appropriate action when one claims damages for the breach of a simple contract.

As has been pointed out this is an action *ex contractu* while other writs of trespass on the case are *ex delicto*. And so it is frequently referred to as a form of action entirely separate from, and independent of, case.(a)

A CONTRACT ESSENTIAL.—The action cannot be maintained without showing the existence of a contract express or implied between the parties. The gist of the action is the promise which must be alleged positively by that or some equivalent word.(b)

ACTION LIES ON SIMPLE CONTRACT ONLY.—The action will not lie upon a specialty even in those states where the

(a) See *Robinson v. Welty*, 40 W. Va. 385.

So there is frequently difficulty in determining whether or not a declaration is framed in assumpsit. For example, in an action against a common carrier the words "agreed," "undertook," or "promised" may import nothing more than the carrier's common law duty, but if an averment of consideration be added the action is on the contract. *Ches. & O. R. Co. v. Stock*, 104 Va. 97 (citing *Hutchinson on Carriers*, 2d Ed., § 744). And see, *Booth v. Farmer's, etc., Bank*, 65 Barb. 457.

(b) *Cummings v. Synnott*, 120 Fed. 84; *Reilly v. Crown Petroleum Co.*, 213 Pa. 595; *Robinson v. Welty*, 40 W. Va. 385; *Wheeling Mould & Foundry Co. v. Wheeling Steel & I. Co.*, (W. Va.) 57 S. E. 826.

necessity for seals upon deeds has been dispensed with by statute.(c)

But it will lie if a contract under seal is varied by a parol agreement or by act of law.(d)

The plaintiff cannot waive covenant and sue in assumpsit and an amendment that changes the form of action from assumpsit to covenant is not allowable.(e)

SPECIAL ASSUMPSIT. When the right to recover is based upon an express contract the action is special assumpsit.

GENERAL ASSUMPSIT is the form used when the right to recover is based upon an implied promise without regard to whether or not there was an express contract.

COMMON COUNTS.—To this class belong the common counts, which are based on a promise, express or implied, to pay money in consideration of a preceding and existing debt.(f)

These are the *indebitatus* count, under which could be inserted a count for the price or value of real property sold

(c) *Horner v. Beasley*, (Md.) 65 Atl. 820 (where the action was maintainable, the seal having been affixed without authority by an agent); *Crandall v. Johnson*, 26 R. I. 250.

(d) *McCardell v. Miller*, 22 R. I. 96; *Conroy v. Equitable Acc. Co.*, 27 R. I. 467.

(e) *McKay v. Darling*, 65 Vt. 639.

BUT BY STATUTE, in some states assumpsit may be maintained where covenant will lie (*Grubb v. Burford*, 98 Va. 553), and in others, for sums due for rent on leases under seal or otherwise (*Boom Co. v. Paper Co.*, 96 Me. 96), and in others for damages growing out of fraud and deceit (*Hallett v. Gordon*, 128 Mich. 364).

(f) *W. F. Parker & Son v. Clemon*, (Vt.) 68 Atl. 646.

General assumpsit can be maintained to recover money paid on a warranty when the consideration has failed. *Tatro v. Bailey*, 67 Vt. 73. As to the form of action on a warranty express or implied, see *Chandeler v. Lopus*, 1 Sm. L. C. (9th ed.) 319 and notes; *Dunn v. Auburn Electric Motor Co.*, 92 Me. 165.

by the plaintiff to the defendant; the *quantum meruit*; the *quantum valebant*; and the account stated. (g)

The *quantum meruit* and *quantum valebant* counts are seldom used, for the *indebitatus* count covers the ground. (h)

ACCOUNT STATED DIFFERS from the action of account in

(g) *Nugent v. Teachout*, 67 Mich. 571. And see 1 Chit. Pl. *351 *et seq.*

EVEN UNDER THE CODES THE COMMON COUNTS ARE ALLOWED and are frequently resorted to. *Wilcox v. Jamieson*, 20 Col. 158; *Worthington v. Worthington*, 100 App. Div. 332, 337.

The code provision that the complaint shall contain a plain and concise statement of the facts constituting the cause of action does not require a different or more complete statement than the declaration formerly required. In all cases where the money counts might have been used at common law, therefore, the plaintiff may still set forth his cause of action in that form. *Goodman v. Alexander*, 165 N. Y. 289, 293 (citing Moak's Van Santvoords' Pleading, 204). And see *infra*, DECLARATION.

IN CONNECTICUT the use of the common counts is allowable only when one or more of them is appropriate as a general statement of the cause of action. And if the bill of particulars or amended complaint shows this not to be the case a motion to strike from the files will be granted. *Goodrich v. Alfred*, 72 Conn. 257, 260.

UNDER THE VIRGINIA CODE the question came up recently in a case where the plaintiff had made use of the *indebitatus* count for services rendered. Construing the provision that "on demurrer * * * the court shall not regard any defect * * * unless there be omitted something so essential to the action or defense that judgment according to law and the very right of the case cannot be given," the court held that the common law rule requiring that a promise, not expressly made but implied by law, must be averred, "is so highly technical that we cannot hold that error was committed in refusing to sustain the demurrer on this ground." *City of Newport News v. Potter*, (Va.) 122 Fed. 321.

SO IN MISSOURI, "where there is but one cause of action and where only one recovery can be had, the plaintiff may state it in different counts for the purpose of so varying the form of statement as to meet any possible state of proof." *Peery v. Railroad*, 122 Mo. App. 177.

(h) *Parker v. Macomber*, 17 R. I. 674.

that the account sued on is balanced and the amount agreed on before action brought. (i)

COMMON COURTS NOT MAINTAINED ON EXPRESS CONTRACT.—Generally where there is an express contract no recovery can be had under the common counts unless the contract has been fully performed in all essential particulars, and nothing remains to be done but to pay money due thereunder. In such case the contract is competent evidence to show its terms, and on the question of damages. (j) But this requirement has been relaxed in some states where it is held sufficient that the plaintiff has in good faith endeavored to perform fully and exactly, a benefit to the defendant being shown. (k)

Damages for breach of contract cannot be shown under the common counts for work and labor done at the request of the defendant. (l)

TORT MAY BE WAIVED.—When personal property has been converted the owner may waive the tort and sue in assumpsit and show the facts in evidence under the common counts. (m)

(i) *W. F. Parker & Son v. Clemon*, (Vt.) 68 Atl. 646, and cases cited.

(j) *Newman v. Lumley*, 125 Ill. App. 382; *Ryan v. Hooton*, 122 Ill. App. 514; *Thompson v. Hoppert*, 120 Ill. App. 588; *Richards v. Richman*, (Del.) 64 Atl. 238.

(k) *Viles v. Traction & Power Co.*, 79 Vt. 211.

(l) *Loranger v. Davidson*, 110 Mich. 605.

(m) *Kleinbohe v. Hoffman House*, 50 Misc. 127; *Hornefus v. Wilkinson*, (Oreg.) 93 Pac. 474. And see *infra*, ELECTION OF REMEDIES.

CHAPTER XIV.

TROVER.

DEFINITION.—Trover is another of the writs of trespass on the case. It was originally framed to meet the case where the defendant had found goods belonging to the plaintiff and had converted them to his own use. It is an action which lies for the recovery of damages for the conversion of the plaintiff's goods. The gist of the action is the unlawful conversion of goods which came lawfully into the defendant's possession. The codes generally have preserved the boundaries of the action.(a)

PROPERTY MUST HAVE VALUE.—This action will lie only for damages for the conversion of personal property of value. So while it will lie for the conversion of negotiable instruments,(b) or of a policy of insurance,(c) or of shares of stock,(d) or of money in specie that can be identified,(e) or of domestic animals,(f) it will not lie for property of no value; as, for example, private letters,(g) or void notes,(h)

THE CONVERSION MUST BE A POSITIVE TORTIOUS ACT,(i) and, generally, it is by a wrongful taking, by an illegal as-

(a) *Davis & Son v. Hurt*, 114 Ala. 146.

(b) *Long v. McIntosh*, (Ga.) 59 S. E. 779; *Hynes v. Patterson*, 95 N. Y. 1.

(c) *Hayes v. Mass. Mut. L. Ins. Co.*, 125 Ill. 626.

(d) *Daggett v. Davis*, 53 Mich. 35.

(e) *G. T. R. Co. v. Edwards*, 56 Barb. 408, 412.

(f) *Drew v. Spaulding*, 45 N. H. 472.

(g) *Donohue v. Henry*, 4 E. D. Sm. 162.

(h) *Miller v. Lamery*, 62 Vt. 116.

(i) *Bolling v. Kirby*, 90 Ala. 215.

sumption of ownership, by an illegal user or misuser, or by a wrongful detention. *(j)*

THE INTENT.—It is no defense that the conversion was by mistake, *(k)* or without corrupt intention. *(l)*

WHAT IS A CONVERSION?—A claim of title to the goods is not sufficient. The defendant must have had them in his possession, actual or constructive. *(m)*

An exercise of dominion over the goods by the defendant without actual removal may amount to a conversion. *(n)*

Any distinct act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion, a manual taking being unnecessary. *(o)* But a mere claim without authority or dominion is not a conversion. *(p)*

A DEMAND AND REFUSAL to surrender the property are evidence of conversion. *(q)*

Generally speaking a demand is a prerequisite to the maintenance of the action where the defendant came lawfully by the property in the first instance, *(r)* but this is not so

(j) *Glaze v. McMillion*, 7 Port. 279.

(k) *Lahner v. Hertzog*, 23 Ill. App. 308; *Stough v. Stefani*, 19 Neb. 468.

(l) *Swim v. Wilson*, 90 Cal. 126; *Haddix v. Einstman*, 14 Ill. App. 443; *Kenney v. Ranney*, 96 Mich. 617; *Gore v. Iser*, 64 Neb. 843; *B. & O. R. Co. v. O'Donnell*, 49 Ohio St. 489.

(m) *Bishop v. Hendrick*, 82 Hun 323, 336.

(n) *Zion v. DeJonge*, 39 Misc. 839.

(o) *McPheters v. Page*, 83 Me. 234; *Baker v. Beers*, 64 N. H. 102 (citing *Cooley on Torts*, 448).

(p) *Connah v. Hale*, 23 Wend. 466. "And the mere execution of a deed or lease of premises and surrender of possession thereof to another does not render the owner liable in conversion for all the property of the tenants of the building either as to tenants in possession and occupation or as to those who have left some of their property temporarily." *Huntington v. Heroman*, 111 App. Div. 875.

(q) *Weston v. Carr*, 71 Me. 356; *Munger v. Hess*, 28 Barb. 75.

(r) *Dean v. Cushman*, 95 Me. 454; *Castle v. Corn Exchange Bank*, 75 Hun 89.

where an actual conversion is shown, as by a wrongful taking or a wrongful sale.(s)

POSSESSION or the present right to possession is essential to the maintenance of the action, and must be alleged.(t) So the owner cannot maintain trover for property which is lawfully in the possession of a custodian.(u)

THE GENERAL ISSUE is "not guilty," and under it the defendant may show everything which he could plead in bar except a release.(v)

THE MEASURE OF DAMAGES generally, in the absence of special circumstances, is the value of the property at the time of the conversion with interest from that date.(w)

RETURN OF THE GOODS—EFFECT OF.—The action being for damages for unlawful conversion is not defeated by the return of the goods.(x) The measure of damages in such a case would be the excess of the injury suffered over the value of the goods when returned.(y)

(s) *Barker v. Lewis Storage & Transfer Co.*, 78 Conn. 198; *Hewitt v. Estelle*, 92 Ill. 218; *Purcell Cotton Seed Oil Mills v. Bell*, (Ind. Terr.) 104 S. W. 944; *Waller v. Bowling*, 108 N. C. 289.

(t) *Barker v. Lewis Storage & Transfer Co.*, 79 Conn. 342; *Golden v. Moore*, (Mo.) 104 S. W. 481; *Innovation Trunk Co. v. Platt*, 56 Misc. 645. See *Clark v. Clement*, 75 Vt. 417, where plaintiff had in his possession a team of horses for which he had partially paid defendant, and which the defendant had wrongfully taken again.

(u) *County Armagh etc. Ass'n. v. Lennon*, 102 N. Y. Suppl. 522.

(v) *Ryan v. Young*, (Ala.) 41 So. 954.

(w) *Wenham v. Wilson*, 129 Ill. App. 553; *Corn Exch. Bank v. Peabody*, 111 App. Div. 553.

Special damages are sometimes allowed by statute. *Aronson v. Oppegard*, (N. D.) 114 N. W. 377.

(x) *Plummer v. Reeves*, (Ark.) 102 S. W. 376; *Davidson v. Oberthier*, (Tex. Civ. App.) 93 S. W. 478.

(y) Id.

CHAPTER XV.

ACTIONS IN THE CODE STATES.

ONE FORM OF CIVIL ACTION AND TECHNICAL WORDS UNNECESSARY.—Under the codes there are two kinds of action, viz., civil and criminal.

There is only one form of civil action which has no name. So an action cannot be defeated because the plaintiff improperly designates it, and accordingly it is no longer necessary in pleading under the codes to use the words formerly employed to distinguish actions.

UNDERLYING PRINCIPLES CANNOT BE IGNORED.—But it is impossible to disregard the substantial principles which underlie our system of jurisprudence. (a) It is not possible to prevent the human mind from distinguishing between things that differ. "The distinction between the different forms of action for different wrongs requiring different remedies lies in the nature of things." (b)

DIVISIONS EX CONTRACTU AND EX DELICTO REMAIN.—So the distinction remains between actions in character *ex delicto* and those *ex contractu*. (c) "Although the code has abolished all distinction between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is im-

(a) *Stirling v. Garrittee*, 18 Md. 468.

(b) *McFaul v. Ramsey*, 20 How. 523, 525. And see, *Matthews v. McPherson*, 65 N. C. 189.

(c) *Ashe v. Gray*, 88 N. C. 190; *Bullinger v. Marshall*, 70 N. C. 5.

possible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before."(d)

While there are no forms of action as the phrase is understood at common law, yet when the averments of facts in a complaint show the case to be one for which a particular form of action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common law action.(e)

HOW CAN ACTIONS BE DISTINGUISHED?—It can be seen then, very readily that it is frequently of the greatest importance to determine whether a plaintiff is suing *ex contractu* or *ex delicto*. In deciding this question the complaint must be considered in its entirety.

If the controlling facts set forth in a complaint constitute a cause of action *ex contractu* the mere presence of an averment of fraud or negligence does not make the action one *ex delicto*.(f)

(d) Per Selden, J., in *Goulet v. Asseler*, 22 N. Y. 225, 228.

(e) *Faulkner v. First National Bank*, 130 Cal. 458. And see, *Wumsley v. Atlas S. S. Co.*, 168 N. Y. 533, an action for conversion, where it was said that the same proof was required to support the judgment as was formerly required at common law.

(f) *Sparman v. Keim*, 83 N. Y. 245; *Jones v. Walker*, 63 N. Y. 612; *Ledwich v. McKim*, 53 N. Y. 307; *Rothchild v. Grand Trunk R. Co.*, 30 N. Y. St. 642.

In *Catlin v. Adirondack Co.*, (Ct. of Appeals), 11 Abb. N. C. 377, the complaint alleged that the defendant was a corporation engaged in carrying goods for hire; that the plaintiff delivered to the defendant three trunks; that the defendant undertook and became responsible to the plaintiff for their safe transport; that the trunks were delayed and that when they were delivered it was

THE DISTINCTION BETWEEN LEGAL AND EQUITABLE RELIEF.—So where it is said that the distinction between actions at law and suits in equity has been abolished it is not meant that the distinction between legal and equitable relief is no longer recognized. These are essential distinctions which inhere in the nature of things, and which therefore are preserved. These lie chiefly in the character and scope

found that articles had been taken therefrom while defendant was responsible for their safety. The Court of Appeals said:

"The liability of a common carrier for the non-delivery of goods intrusted to him for carriage may be enforced by an action in either of the forms formerly known as *assumpsit* or tort, at the option of the pleader. * * *

"If he chose to predicate it upon tort, he would allege the custom of the realm, the loss by conversion, etc."

In *Weed & Weed v. The Saratoga & Schenectady Railroad Company*, 19 Wendell, 534, *assumpsit* against common carriers, the declaration contained two counts: In the first it was alleged that the defendants undertook and promised the plaintiff to take care of, and securely carry and convey by their coaches and railroad cars from Saratoga Springs to Schenectady for the plaintiffs, a trunk containing certain goods, etc., and bank bills, in consideration of a certain reward, etc.; but that they so carelessly conducted themselves that the trunk and its contents were lost, etc. The second count was like the first, except that the undertaking was alleged to be to carry the trunk and its contents from Saratoga Springs to Albany.

Mr. Justice Cowen said:

"The contract as set forth was to carry the trunk and money of the plaintiffs. The proof is that the trunk belonged to Martin, a stranger; nor was it shown that the plaintiffs had any connection with it. * * * It was said by the plaintiffs' counsel, that the declaration here might be considered as in case for a tort; and if that were so, the strictness required in proving the articles alleged to have been delivered for carriage would not be so great. But clearly the declaration is in *assumpsit* upon the contract. Here is the consideration, and the promise made to the plaintiffs to carry two things at least; the trunk and the money, according to the form (2 Chit. Pl., 355, ed. 1823). A declaration in case for the like injury is given (id. 651)."

of the remedies which may be obtained.(g) As was said by Judge Earl:(h) "It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. At any rate the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments."

THE CODE PRESERVES REMEDIES.—The framers of the code intended to devise a perfect system that would vest in one court power to administer all the remedies, both at law and in equity, which formerly existed, to be worked out in one form of action and with one system of pleading. All remedies, both in law and equity, have been preserved, but

(g) *Reubens v. Joel*, 13 N. Y. 488, 498; *Kinnan v. F. S. S. M. & St. N. A. R. Co.*, 14 N. Y. 183.

In *Quincy v. Steel*, 120 U. S. 241, 244, the Supreme Court of the United States declared it a cardinal principle of Federal jurisprudence, "that in the Federal Courts the distinction between actions at law and suits in equity has always been kept up. In the present case it is but a plain suit to recover damages on a written contract."

And again at p. 248:

"The clear impression left upon reading the bill is that it is an attempt to have a plain common law action tried in a court of equity."

(h) In *Gould v. Cayuga County National Bank*, 86 N. Y. 75, 83-84. And see, *Stevens v. Mayor, etc.*, 84 N. Y. 296.

the method by which the jurisdiction shall be exercised and the remedies pursued have been changed.(i)

JUDGMENT MUST BE SECUNDUM ALLEGATA ET PROBATA.—The complaint takes the place of the declaration in actions at law and of the bill in chancery.(j) But the recovery must be had *secundum allegata et probata*. The plaintiff must bring his case within the allegations as well as within the proofs. There can be no orderly administration of justice without pleadings and a distinct issue. This is fundamental.(k)

FRAME OF COMPLAINT DETERMINES.—Whether the action is legal or equitable is to be determined by the frame of the complaint(l) and not by the designation given to the action by the plaintiff.(m) The prayer for relief may be resorted to in case of doubt,(n) but is not conclusive.(o)

(i) *New York S. & T. Co. v. Saratoga G. & E. L. Co.*, 88 Hun, 569; *Kollock v. Scribner*, 98 Wis. 104, 117. And see, *Mandeville v. Reynolds*, 68 N. Y. 528; *Sternberger v. McGovern*, 56 N. Y. 12.

(j) The codes affect matters of form in equity as well as in common law pleading. The rule touching the statement of facts constituting the cause of action is the same in legal and in equitable cases. *Trustees, etc., v. Christ Church*, 68 Conn. 372; *Riggs v. Chapin*, 7 N. Y. Suppl. 765.

(k) *Phelps v. Mayor, etc.*, 25 Abb. N. C. 156; *Stevens v. Mayor, etc.*, 84 N. Y. 296; *Southwick v. First Nat. Bank*, 84 N. Y. 420, 429; *Day v. Town of New Lots*, 107 N. Y. 148, 155; *Becker v. Krank*, 75 App. Div. 191; *Cody v. First Nat. Bank*, 63 App. Div. 199.

If a plaintiff is entitled to enforce specific performance of a contract or to recover damages for the breach of the contract, and frames his complaint in equity asking for specific performance, he must abide by his election. If the evidence in such a case shows him entitled to legal relief only, his action cannot be sustained. *Bowen v. Webster*, 3 App. Div. 86.

(l) *Mills v. Bliss*, 55 N. Y. 139; *Graves v. Spier*, 58 Barb. 349.

(m) *Johnson v. Girdwood*, 7 Misc. 651.

(n) *Elias v. Schweger*, 27 App. Div. 69.

(o) *Williams v. Slote*, 70 N. Y. 601; *Marie v. Harrison*, 13 Abb. N. C. 210.

CHAPTER XVI.

ELECTION OF REMEDIES, AND THEORY OF ACTION.

IMPORTANCE OF ELECTION UNDER EVERY SYSTEM.—From what has gone before it is clear that whether under the code or the common law system of procedure, or under the more or less modified system which exists to-day in several so-called common law states, it is of the greatest importance that a party seeking to enforce a right or to redress a grievance, should make a proper choice of remedies by which to proceed. (a)

THE RULE OF ELECTION STATED.—The necessity of making a proper choice as the preliminary step arises from the consideration that after the party has once chosen to proceed by one of two inconsistent remedies, he is held to have elected and is thereafter barred from pursuing a remedy based on a right inconsistent with that set up by the remedy chosen, and growing out of the same subject of controversy. If this were not so the court would often be required to go again over the same evidence where one process would af-

(a) For example, one with whom a carrier has made a contract to transport his goods has his election in case of breach to sue either for damages for failure to observe the public duty enjoined on the carrier, or to waive the tort and sue for breach of the special contract. And if he elects to pursue the latter course, and if there should prove to be any difference in the liability of the carrier in the two cases, in the rules of evidence or in the measure of damages, the plaintiff would be bound by his election, and would be confined to those rules governing cases *ex contractu*. *Denman v. Chicago, B. & O. R. Co.*, 52 Nebr. 140.

One may waive alleged defects in proceedings to condemn a highway and obtain compensation for the land condemned, or he may take advantage of irregularities in the proceedings, if there have been any, and, regarding the land as still his property, maintain trespass for an injury to the possession. (i)

CONTRACT CANNOT BE BOTH AFFIRMED AND DISAFFIRMED.—Where a party may resort either to an action upon contract or to an action in tort the election to proceed in one or the other way concludes him, for it is inconsistent both to affirm and to disaffirm a contract. (j)

If one by fraud and deceit induces another to enter into a contract, the latter, on discovering the fraud, may either affirm the contract or rescind it. If he affirms the contract he may sue to recover the consideration (as, for example the price of goods sold), and may also bring an action for the damages which he has sustained by reason of the deceit. These actions both, in effect, affirm the contract. But he cannot maintain either of these actions after he has reclaimed the subject of the contract, and obtained a decree that the contract was void *ab initio*. By the latter course he has rescinded the contract. (k)

THE DOCTRINE DEPENDS ON INCONSISTENCY OF REMEDIES.—This doctrine has no application where the remedies are not inconsistent. One who puts in suit one of two distinct causes of action arising out of the same transaction is not barred from afterwards suing on the other, unless the

consequential and to cases of fraudulent representations or conduct of any person producing an injury either to the person, property or rights of another for which an action on the case may by law be brought." *Montgomery, J., in Piefka v. Detroit, etc., Ry., 147 Mich. 641.*

(i) *Hussey v. Bryant*, 95 Me. 49. And see, *Hawver v. Omaha*, 52 Neb. 734.

(j) *Theusen v. Bryan*, 113 Ia. 496, 502.

(k) *Bacon & Company v. Moody*, 117 Ga. 207.

remedy first sought is inconsistent with that subsequently pursued.(l)

Actions may differ in form without that being alleged in one which is denied in the other. Though not identical, actions may be consistent.(m) Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and, therefore, the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for an injury to the person.(n)

TWO REMEDIES MUST ACTUALLY EXIST.—There must be actually two inconsistent remedies. Election is distinguished from mistake as to remedy, and a party is not precluded from bringing an appropriate action by proceeding upon an inappropriate one by which no recovery could be had. In such a case there is only one remedy.(o)

Unconstitutional and Void Remedy.—One who pursues a remedy provided by a statute that is unconstitutional and void is virtually acting under a mistake as to his rights.(p)

Proceeding in Court Without Jurisdiction.—Neither is one barred from the maintenance of a proper action by an attempt to recover in a court without jurisdiction.(q)

(l) *Douglass v. Galwey*, 76 Conn. 683, per Baldwin, J.; *Ironton Land Co. v. Butchart*, 73 Minn. 39; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 13 L. R. A. 91; *White et al. v. White et al.*, 68 Vt. 161.

(m) *Craig v. Meriwether*, (Ark.) 105 S. W. 585; *Bowen v. Mandeville*, 95 N. Y. 237; *Crockett v. Miller*, 112 Fed. 729.

(n) *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Mitchell v. Darley Main Colliery Co.*, id. 125; 11 App. Cas. 127, overruling *Lamb v. Walker*, 3 Q. B. D. 389.

(o) *Clark v. Heath*, 101 Me. 530; *Sullivan v. Ross*, 113 Mich. 311; *Southern Ry. Co. v. Attalla*, 147 Ala. 653.

(p) *McKim v. Carre*, 72 Kan. 461.

(q) *Garrett v. Farwell Co.*, 199 Ill. 436. See *Roberts v. Moss* (Ky.), 106 S. W. 297.

A FULL KNOWLEDGE OF FACTS OF CASE NECESSARY TO AN ELECTION.—Nor, as has been heretofore shown, is one barred by an action brought before he had a full knowledge of the facts of his case.(r)

Actual Intention Immaterial.—It is immaterial that the party did not intend to bar himself from afterwards proceeding by an inconsistent remedy, if he, at the time when he made his choice, acted with knowledge of the facts.(s)

ELECTION HOW MANIFESTED.—Prosecuting to judgment one of two inconsistent remedies is held to show conclusively an election.(t) And so, it is generally held, is the commencing of an action.(u)

SILENCE, DELAY, ETC.—Where a contract of sale is induced by fraud, silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration for any considerable length of time after the discovery of the fraud constitute a complete and irrevocable ratification.(v)

(r) *Bertoli v. Smith & Co.*, 69 Vt. 425.

(s) *Clausen v. Head*, 110 Wis. 405, 409 *et seq.*

The case of *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, well illustrates the rules laid down in the text. That was a case of a contract obtained by fraud. After knowledge of the fraud the plaintiff could have affirmed the contract or rescinded it. He affirmed it by commencing an action for the sum due under it. Thereafter he could not prosecute an action to recover articles alleged to belong to him which could be maintained only by showing that there was no contract. See also *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216 and note. These two cases distinguished *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25, because in the latter case plaintiff did not have full knowledge of the facts.

(t) *Bacon & Company v. Moody*, 117 Ga. 207.

(u) *Moller v. Tusker*, 87 N. Y. 166; *Conrad v. Little*, *supra*; *Matter of Garver*, 176 N. Y. 386; *White et al. v. White et al.*, 68 Vt. 161, and cases cited at p. 165 *et seq.*

(v) *Stuart v. Hayden*, 72 Fed. 402.

But the period within which decisive action must be taken depends on the circumstances of each case.(w)

THEORY OF ACTION.

It has been explained that where the cause of action is *ex delicto* the plaintiff may waive the tort and sue in *assumpsit*.(x) It is equally true that the plaintiff who has elected to sue in tort cannot recover in *assumpsit*.(y) and that after he has elected to base his action upon the contract he cannot change his ground during the trial and proceed on a new theory.(z)

Parties cannot blow hot and cold, and if, having an election to affirm or to disaffirm a contract, they proceed on an affirmation they must act consistently throughout.(a)

So if the complaint states a cause of action *ex delicto*, the court on the trial cannot convert it into one *ex contractu*.(b)

And if the allegations of the complaint are so confused and indefinite as to make it impossible for the court to tell upon what theory the plaintiff is attempting to proceed, the complaint will be held insufficient.(c)

(w) *Tyler v. Moses*, 13 App. Cas. 428, 444. See also, *Williams' Heirs v. Zengel*, 117 La. 599; *Watson v. Perkins*, (Miss.) 40 So. 643; *Turner v. Grimes*, (Neb.) 106 N. W. 465; *In re Pederson's Estate*, 97 Minn. 491.

(x) See *Rothschild v. Mack*, 115 N. Y. 1; *Slade v. Montgomery*, 53 App. Div. 343; and *supra*, p. 61.

(y) *Bermel v. Hornischfeger*, 97 App. Div. 402.

(z) *Ross v. Mather*, 51 N. Y. 108; *Langdon v. N. Y. L. E. & W. R. Co.*, 9 N. Y. Suppl. 245, affirmed in 58 Hun, 122; *Prince v. Ridge*, 32 Misc. 666; *Aetna Powder Co. v. Hildebrand*, 137 Ind. 462; *Green v. Groves*, 109 Ind. 519.

(a) *Smith v. Hadson*, 4 T. R. 211, 2 Sm. L. C. (9th ed.) 1372.

(b) *Neudecker v. Kohlberg*, 81 N. Y. 296; *Willis v. Morse*, 26 St. Rep. 875.

(c) *Grentner v. Fehrenschild*, 64 Kan. 164.

In *Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, Justice Bardeen said: "There still remain certain elements or features

Generally under the code practice, if the allegations of a complaint are appropriate to either of two causes of action, the plaintiff may, on motion, be required to elect the ground upon which he will proceed.(d) The motion to compel an election should be made before filing the answer, but the court may compel the plaintiff to elect on the trial.(e)

pertaining to action which are unchanged. These do not belong to the action as a judicial instrument for establishing a right, but inhere in and belong to the primary and remedial rights themselves. For the enforcement and protection of these rights but one form of action exists, but, as to the remedies which lie back of all forms of action, the law still recognizes and observes distinctions which are as vital as before the Code. It is just as necessary to-day as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*."

(d) *Saunders v. Phelps Co.*, 53 S. C. 173.

(e) *Mayo v. Knowlton*, 134 N. Y. 250.

PART II.

PROCEDURE.

CHAPTER I.

I. THE ORIGINAL WRIT.—The *original writ*, which forms the first stage of a suit at law, and is the foundation of all the subsequent proceedings in it, is no part of the *pleadings*; (a) since it does not consist of the allegations, and is not the act, of either party; but is a mandatory precept (b), issued by the authority, and in the name of the sovereign or the state, for the purpose of compelling the appearance of the defendant before the court, to which it is returnable, that he may there make answer to plaintiff's complaint. (c) The

(a) *Richardson v. Milburn*, 11 Md. 340.

(b) The writ was directed to the sheriff of the county in which the cause of action was alleged to have arisen.

(c) 3 Black. Com., 273; 1 Tidd. 93.

[The original writ "issued out of Chancery." This was not because the Court of Chancery had any supervision of the courts of law, but because the Chancellor kept the Great Seal as the immediate representative of the King who was the "fountain of justice." This refers to a time antedating the wide jurisdiction of the Court of Chancery as we know it, and long prior to the conflicts on questions of jurisdiction between the Chancery and the courts of common law.

THERE IS NO LONGER ANY ORIGINAL WRIT in the former technical sense. The jurisdiction of the court, and the forms of writs, and the manner of commencing actions, are now provided by statute. *Pussey v. Snow*, 81 Me. 288.

IN VERMONT the writ and declaration are blended in the same instrument. The declaration is made a part of the writ and the

general nature of the plaintiff's demand is, indeed, mentioned in the writ that the defendant may know, before he appears in court, to what *kind* of complaint he is required to answer; but the *particular* cause of action—the specific wrong or breach of contract complained of—does not appear until the declaration is filed. (d) But though the writ is no part of the pleadings, it may, for various causes, be excepted to and destroyed, by pleading; (e) as for the want of any legal requisite, or in general, for any irregularity, informality or mistake.

The suit commences, from the *issuing* of the original writ; and if the writ bears a fictitious date, the true time of its issuing may be proved, whenever the time is material, and the ends of justice require that the time of its actually issuing be shown. (f)

whole is treated and construed as one instrument, so that a defective description in one may be aided by referring to the other. *Mouththrop v. School Dist.*, 59 Vt. 381.

(d) Bac. Abr. *Actions in Gen. C.* 1 Tidd, 96.

(e) But not for any defect in the declaration. *Bean v. Green*, 4 Cush. 279.

(f) 2 Burr. 962-6. Cowp. 454. 3 Black. Com. 273, 285. 7 T. R. 4. 1 Wils. 147.

UNDER THE ENGLISH JUDICATURE ACT all suits are commenced by writ of summons.

IN THIS COUNTRY generally the summons takes the place of the original writ. The jurisdiction of our courts being fixed by constitution and statutes we need no original writ issuing out of Chancery. *Bank of New Brunswick v. Arrowsmith*, 9 N. J. L. 353; *State Bank v. Van Horn*, 4 N. J. L. 439.

THE SUMMONS is original process. *Birmingham Dry Goods Co. v. Bledsoe*, 113 Ala. 418; *Northern Bank of Kentucky v. Hunt's Heirs*, 93 Ky. 67, 71. But this is not so held in all states. Thus, in Minnesota a summons is not process but a notice to the defendant that proceedings have been instituted. It is therefore sufficient if the defendant is informed that it is intended for him and that he is required to answer. *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13. And see, *Wagnitz v. Ritter*, 31 Wash. 343, 348.

WHEN THE DECLARATION IS PROCESS.—By statute, in some states, an action for debt or damage may be commenced by filing and

II. THE PLEADINGS, in a civil suit, commence with the *declaration, or count*, (g) the word *plea*, (*placitum*) being a serving the declaration, which is therefore considered process. *City of Menominee v. Circuit Judge*, 81 Mich. 577, 579.

IN MAINE, however, except in *scire facias* and other special writs, all civil actions are still commenced by original writ, and the Supreme Judicial Court, by general rules, may make such changes therein as changes in the law or other causes require. Me. Rev. Stat. (1903), ch. 83, § 2.

Scire facias is not an original writ within the technical meaning of the old English law. *Clark v. Paine*, 11 Pick. 67.

Writs of summons and attachment are original writs. *Pressey v. Snow*, 81 Me. 208.

WHEN THE ACTION IS COMMENCED.—In some states the action is held to be commenced by issuing the summons, and the summons is held to be issued when it is put out from the clerk's office. *Houston v. Thornton*, 122 N. C. 365, 374.

Filing the complaint, on the other hand, is the commencing of the action in many states (Cal. Code Civ. Proc. § 405; *South Missouri Lumber Co. v. Wright*, 114 Mo. 326), and a summons issued before the complaint is filed is invalid and void and will not sustain a default. *Deegan v. State*, 108 Ind. 155, 157; Mo. Rev. Stat. (1899), § 566.

In some states suit is not commenced till the summons is served. In New Jersey suit is begun when process, duly tested and issued, is actually put in motion for the purpose of being served. *County v. Pacific Coast Borax Co.*, 67 N. J. L. 48. In *East Tenn. Coal Co. v. Daniel*, 100 Tenn. 65, suit was held not to have been commenced when the process was taken by the attorney but not delivered to the officer to serve.]

UNDER THE NEW YORK CODE, the *summons* answers the purpose of the *writ*; the suit being by it commenced;—and by its service

(g) 3 Black. Com. 393. [Called variously in the code states, count, complaint or petition. The name is immaterial, generally speaking.

ABSENCE OF DECLARATION.—A judgment after a trial on the merits will not be reversed on appeal because there was no declaration. *Glenn v. Copeland*, 2 W. & S. 261. It is the general understanding of the profession that if a plaintiff goes to trial without a formal declaration he is to be taken as relying upon one suited to his case as made by the testimony. So, in such a case, an objection of variance between proof and declaration cannot be sustained. *Davis v. Golston*, 53 N. C. 28.]

generic, or collective term, comprehending all the allegations, made on either side, in the various stages of pleading^(h)

the court has jurisdiction of the *person* of the defendant. (*Code* § 416, 424).—The *time* of suit commenced is, however, not that of the *issuing*, but that of the *service*, of the summons; (*Code* § 416) which is, of course, to be proved, whenever it is material to show the time of commencing the suit. [The court will notice the date of the summons in the case for the purpose of deciding when suit was commenced. *Keene v. Newark Watch Case etc. Co.*, 81 App. Div. 48].

The *true purport* of the summons should also be understood; both in its *office*, and in its *effect*: Since, though the provisions of the Code (§§ 417, 418) are general and indefinite, the summons *characterizes* the suit; and the subsequent pleadings must not *vary* from it. And our practice is not without instances, where a party falls of attaining the remedy to which his case would entitle him, by reason of defects in the summons. It is, (as the writ was,) the *foundation* of all the pleadings; and the superstructure must be *upon it*. And a complaint, showing a cause of action which does not call for the *relief* asked in the summons, would be fatally defective; and on motion would be *struck out*. [See *supra*, Theory of Action].

[PRAECIPE.—In some states it is the practice of the attorney to file with the clerk a praecipe, or order, which is a memorandum that should specify the court, the names of the parties, the kind of action, the kind of writ, when it is to be returnable, and the amount of the debt or damage. *Milwaukee Ins. Co. v. Schallman*, 188 Ill. 213, 220; *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 61. The clerk is protected by it. *Harlan v. Plater*, 19 W. N. C. 401. An erroneous praecipe may be amended. *Davis v. Brode*, 13 Pa. Co. Ct. 631.

See the statutes of Florida, Kansas, Nebraska and Ohio.]

EVIDENCE TO SHOW DATE.—Where the action is held to be commenced on the day of the *date*, and not of the service of the writ, evidence is admissible to rebut the presumption arising from the date; but until rebutted, the presumption is to prevail that the true date appears. *Gardner v. Webber*, 17 Pick. 407; *Bunker v. Shed*, 8 Met. 150. The writ may be considered as purchased at any moment of the day which will most accord with the truth and justice of the case. *Badger v. Phinney*, 15 Mass. 359; *Seaver v. Lincoln*, 21 Pick. 267.

The issuing a writ of summons is not a judicial act, and the

(h) Carth. 334. Skinn. 554. 1 Saund. 388, n. 6.

though in a more limited and appropriate sense, the term *plea*, in the singular, is used to denote the *first* plea, or answer made by the defendant, to the declaration or the writ. (i)

A.—THE DECLARATION is a statement at large of the cause of action, (of which the writ gives only a *general* description); or—as it is usually denominated—an amplification, or exposition, of the original writ, with the addition of the time when, and the place where, the cause of action arose, and of all necessary circumstances. (j)

PROFERT.—It is a general rule of the common law, that when a party declares on, or otherwise pleads, a *deed* (as a bond, covenant, &c,) and *makes title* under it (i. e. founds his demand or defence upon it), he must make a *profert* of it in his pleading, by averring that he ‘bring here into court the said writing obligatory,’ (or other deed.) (k)

B.—THE DEFENDANT’S PLEA.—1. The pleadings, which *succeed* the declaration, begin with the defendant’s *plea*; For the writ being returned, and the plaintiff’s complaint being presented in full; it is incumbent on the defendant, within

court may inquire at what period of the day it was issued. Where the writ is dated on the day on which a penalty is incurred, evidence is admissible to prove that it issued after the cause of action accrued. In a very recent case it appeared from the declaration that the writ of summons in the action was issued on the second of July, and that the cause of action arose on the same day, but before the issue of the writ. The declaration was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the earliest moment of the day before the cause of action accrued. The Court of Appeal held that the court could inquire whether or not the writ was in fact issued after the cause of action accrued. *Clarke v. Bradlaugh*, 8 Q. B. D. 63; reversed in the House of Lords, 8 App. Cas. 354, on another ground.

(i) 3 Black. Com., 299, 301.

(j) Co. Litt. 303, b. 3 Black. Com. 293. Bac. Abr. *Pleas*, etc. B. 1.

(k) Com. Dig. *Pleader*, O. 1; 10 Co. 92, a. b.; 1 Brownl. 221; Yelv. 201; 3 Black. Com. App. XXII.; Lawes’ Pl. 96-7. For convenience *profert* and *oyer* will be treated in full *infra*.

a reasonable time, to make defence, and put in an answer or plea; as judgment must otherwise go against him, by *default* or *nil dicit*.(l) For if he fails to make answer, within the time required by the rules of practice; he impliedly confesses the truth of the complaint.(m)

2.—DEFENCE.—But as introductory to the plea, the defendant must, in general, make *defence*; which is of two kinds, called *full* defence, and *half* defence.(n) The term 'defence' signifies in the language of pleading, not *justification*, but *resistance* or *denial*.(o)

It is almost unnecessary to observe, that in a less technical sense, the word 'defence' is used as well in legal as in popular language, to signify—not a clause or form, in pleading—but the *subject* of the plea. Thus, if to an action on contract, the defendant pleads infancy, or to an action of trespass, a license; infancy, in the one case, and a license, in the other, is called the defence.(p)

(l) 3 Black. Com. 296. [See *Kansas City M. & B. R. R. Co. v. Sanders*, 98 Ala. 293, where the defendant withdrew all his pleas and suffered judgment by *nil dicit*, contesting only the amount of damages to be assessed under a writ of inquiry].

(m) 1 Stra. 612.

(n) [Long since an obsolete distinction. *Lyman v. Dodge*, 13 N. H. 197, 202. See Appendix, note—.

(o) *Stewart v. Travis*, 10 How. Pr. 148; *Brower v. Nellis*, 6 Ind. App. 323; *Cullen v. Woolverton*, 65 N. J. L. 279.

(p) This is the sense in which the word is used in the code. *Houghton v. Townsend*, 8 How. Pr. 441; *United States v. Ordway*, 30 Fed. 30, 32. "Defense" is what is put forward to defeat the action. *Whitfield v. Aetna Life Ins. Co.*, 125 Fed. 269. And see, *Miller v. Martin*, 8 N. J. L. 201; *Youngblood v. S. C. & G. R. Co.*, 60 S. C. 9 (construing S. C. Constitution, Art. 9, Sec. 15). It is a full answer to the whole, or to some part, of the plaintiff's demand. *Wehle v. Butler*, 43 How. Pr. 5, 15. Under the code it covers matter which only partially extinguishes the plaintiff's claim. *Foland v. Johnson*, 16 Abb. Pr. 235.

Defenses are of two classes: 1. Those which deny some material allegation of the plaintiff; 2. Those which confess and avoid those allegations. *Benedict v. Seymour*, 6 How. Pr. 298; *Donovan v. Main*,

3.—**IMPARLANCES.**—But before the defendant is required to plead, he is, according to ancient practice, regularly entitled, on his prayer for that purpose, to an *imparlance*, or *licentia loquendi*: a term which, in its primitive sense, (being derived from the French word *parler*, to speak) signifies an allowance, to the defendant, of time to *talk* or *confer* with the plaintiff, for the purpose of bringing the controversy, if the parties can agree, to an amicable termination.(q) But an allowance to either party, of time to answer his adversary, (as, to *reply*, *rejoin*, &c.) is, in the more comprehensive sense of the word, called an *imparlance*.(r) In its more usual signification, ‘*imparlance*’ is an allowance, to the *defendant*, of time to plead.(s) Though at this day, time for pleading is, in most cases, allowed according to cer-

74 App. Div. 44; *Staten Island Midland R. Co. v. Hinchliffe*, 170 N. Y. 473, 481.

SET-OFF is not strictly a defense for it neither destroys plaintiff's right of action nor denies that the amount claimed is due. *Naylor v. Smith*, 63 N. J. L. 596. But it is commonly described as a defense. Ga. Civ. Code, § 3745; *Merchants' Bank v. Schulenberg*, 54 Mich. 49. The defense known as “set-off” is not a common-law defense, but is wholly the creature of statute and is regulated by statute. Although in loose and general language a set-off is spoken of as a defense, this language is in no sense apt or correct as matter of pleading. It is not a denial of the plaintiff's claim, and, in order to be asserted, it must be declared on with the same formality that any demand is declared on in an original writ, and the party against whom it is filed must answer in the same manner as the defendant in any other action. It is substantially a cross-action, although under the statute it requires no original writ. Being thus the creature of statute, it can be availed of only in the mode prescribed by statute. *Barnstable Savings Bank v. Snow*, 128 Mass. 512.

A **COUNTERCLAIM** is not a defense and cannot be stricken out on motion as a sham defense (*Baum's Castoria Co. v. Thomas*, 92 Hun, 1), or as irrelevant. (*Fettretch v. McKay*, 47 N. Y. 426)].

(q) 3 Black. Com. 299. Id. App. III, S. E:

(r) [An instance of continuance]. Com. Dig. *Pleader*, D. 1. 1 Tidd, 417.

(s) 1 Tidd, 417. 2 Mod. 62.

tain established rules of practice, without the formality of an *imparlance*.(t)

4. VIEW.—At common law the right to a view did not exist in personal actions but in real and mixed actions, after the plaintiff had counted, the defendant had a right to demand a view of the land in question, or of the land out of which the rent or other subject of claim issued. In an action for waste the jury were allowed to view the land on demand of the defendant.

The exercise of this right now depends on statutes and rules of court in England and generally in this country. And it may be said that, in general, under these provisions, an inspection may be ordered of the premises or property in question if the court, in its discretion, feels that, by such inspection, the jury will better understand and apply the evidence.(u)

(t) 1 Tidd, 417, 420-1; 1 Wils. 154. See Appendix, note—.

[IN ENGLAND, "since 2 Will. IV, ch. 39, in actions commenced by process prescribed by that act, imparlances are abolished, and more recently, under rule 31, T. T. 1853, no entry or continuance by way of imparlance or otherwise shall be made on any record or roll whatever or in the pleadings." Brown's Law Dict., 153.

IN THIS COUNTRY the time for pleading is regulated entirely by code, statute, or rules of court. "The general rules fixing periods for the filing of pleas have taken the place of these special leaves [imparlances]. If the allowance of a general imparlance on application was a waiver of the right to file dilatory motions the running of the entire time allowed by rule for that purpose must have the same effect." *Mack v. Lewis*, 67 Vt. 383, 385.

(u) *County of Bibb v. Reese*, 115 Ga. 346 (an action for damages to land, where it was held that the common law being still in force in Georgia, the trial judge had a right to direct the jury to view the premises without the consent of the parties); *Rich v. Chicago*, 187 Ill. 396; *Vane v. Evanston*, 150 Ill. 616; *Springer v. Chicago*, 135 Ill. 552; *Jackson Co. v. Nichols*, 139 Ind. 611; *N. W. Mut. L. Ins. Co. v. Sun Ins. Office*, 85 Minn. 65; *Brown v. Kohout*, 61 Minn. 113; *Com. v. Miller*, 139 Pa. 77 (nuisance); *Bodie v. Charleston, etc., R. Co.*, 66 S. C. 302; *Gunn v. Ohio Riv. R. Co.*, 36 W. Va. 165; *Washburn v. Milwaukee & L. W. R. R. Co.*, 54 Wis. 364.

5. PROFERT AND OYER.—EXPLANATION OF TERMS.—When an action is founded upon a *deed*, pleaded with a *profert in curiâ*, (an averment that the plaintiff brings the deed into court), the defendant, before he can be required to plead, is entitled, (upon demanding it,) to *oyer* of the instrument; i. e., according to the original meaning of the word, to *hear* it read(*v*) though the immediate object, now proposed in demanding *oyer* of a deed, is to obtain a copy of it, to which the defendant is entitled of course.(*x*) The practical use of a *profert*, in pleading, appears to be, that it enables the court to *inspect* the instrument pleaded(*y*) (the

Under some statutes the jury may be permitted to view the place where any material fact occurred (See *L. N. A. & C. R. Co. v. Schick*, 94 Ky. 191) on the request of either party (*Vice v. Eden*, 113 Ky. 255.)]

(*v*) 3 Black. Com. 299; Lawes' Pl. 96.

(*x*) 2 Salk. 497. Lawes' Pl. 96; 1 Tidd, 526-7.

(*y*) When *profert* is made, the deed is supposed to be *in court*, and to remain there, to the end of the term, unless the cause is sooner determined; and if so, until it is determined. 2 Salk. 497 3 Ib. 119. Bac. Abr. *Pleas*, etc. I 12. (2.)

Under the New York Code, there is no *oyer* [*Supervisors of Livingston v. White*, 30 Barb. 72]; but instead of it, by motion, and order, an inspection is procured, or a copy, of such papers. Indeed, the exhibition is thus obtained of many papers, of which *oyer* was never granted. The order for producing papers covers all the ground of a bill of discovery, in Chancery, in that respect. (Code § 803.)—Besides, this section adds an *entirely new*, and very valuable, provision about *admissions* of the *genuineness* of documents;—to save to parties, and court, the trouble, time, and expense of *proving*, what the opposite party *knows to be true*. [The court acts in its discretion in granting or refusing the application. *Finlay v. Chapman*, 119 N. Y. 404. And if inspection is ordered it will be only of such instruments as are necessary to sustain the position taken by the applicant (*Phelps v. Platt*, 54 Barb. 557; *Sanger v. Seymour*, 42 Hun, 641); information as to which cannot be otherwise obtained (*McAllister v. Pond*, 15 How. Pr. 299). There will be no order for inspection if a subpoena *duces tecum* will answer. *Dalzell v. Fahy's Watch Case Co.*, 5 Misc. 493. Only the books and papers of a party to the action can be thus seen. *Boorman v. Atl. & Pac. R. Co.*, 78 N. Y. 599].

construction and legal effect of which are matter of *law*); and entitle the adverse party to *oyer* of it.(z) Craving *oyer* of a writing, according to the original signification of that term, is demanding to *hear it read*;(a) which prayer, or request, it is the province of the court, to grant or not, as the party praying it may, or may not, be entitled to it.

But in the modern practice, a right to *oyer* entitles the party demanding it, to a *copy* (at his own expense), of the instrument pleaded against him; to the end, that he may have an opportunity to recite it upon the record, and thus

In the State of Connecticut, it has long been an established rule, that a *profert*, in pleading, is in no case necessary, even in point of form: but that, whenever a party is, by the rules of the common law, entitled to *oyer*, on *profert* made, he is, in that state, entitled to it, *without profert*. 1 Root, 566. The general practice of the profession in the state, however, was to make *profert* of instruments pleaded, whenever the rules of the English common law required it. [The same rule obtains under the Practice Act.

In England the Judicature Act made *profert* unnecessary.

In Massachusetts no *profert* or excuse therefor need be inserted in a declaration. And in many states of the Union the instrument which is the foundation of the action, or a copy thereof must be annexed to or set out in the declaration or complaint].

(z) *Leyfield's Case*, 10 Co. 92, b; 1 Chitt. Pl. 414; 1 Archb. Pr. 164. [Profert of a bond sued upon obviates the necessity of averring delivery if such averment is ever necessary. *Boyer v. Sowles*, 109 Mich. 481].

(a) 3 Black. Com. 299, App. No. III. § 6; Lawes' Pl. 96. [The effect of *profert* and *oyer* is to make the deed a part of the record. *Messer v. Smythe*, 58 N. H. 312; *Suydam v. Williamson*, 20 How. 427. Mere *profert* does not have this effect. But the production of the deed upon the prayer of the defendant makes it a part of the declaration as much as though it had been set out *in haec verba* in, and made a part of the declaration. *Village of West Springs v. Collins*, 98 Fed. 933.

Even where *oyer* is not properly demandable, if it is in fact demanded and given the instrument becomes a part of the declaration and the defendant has a right to plead thereon. *Morrill's Admr. v. Catholic Order Foresters*, 79 Vt. 479; *Russell v. Drummond*, 6 Ind. 216. But see *Anderson v. Prince*, (W. Va.) 55 S. E. 656].

avail himself, (upon *the face of the record*), of any thing in the writing, which may aid him, in meeting the allegations of his adversary.(b)

Thus to debt on bond, the defendant having obtained *oyer* of it, and recited the condition, is enabled to avail himself of the latter, by pleading, or demurring, as his case may require.(c)

The ground on which *oyer* is awarded, in any case, is, that the party, whom the law entitles to it, is presumed to be unable, *without it*, to give a proper answer to the title made under the instrument, pleaded by the adverse party. And therefore, when he, who is entitled to *oyer*, demands it, he is not bound to answer, in any way, until it is given; but if he does plead, without demanding it, he waives his claim to it.(d)

Formerly, in the English practice, if he, who was bound to give *oyer*, did not give it, within *two days* from the day of the demand, (*excluding that day*;) the adverse party might *sign judgment* against him(e), otherwise, the party, bound to give *oyer*, might, by neglecting it, delay the proceedings indefinitely.

OF WHAT INSTRUMENTS MUST PROFERT BE MADE?—As, however, the right to *oyer* on one side, results from the *profert* made on the other; the first proper inquiry, under the present head, is, in what cases it is necessary, for him who pleads an instrument, to make a *profert* of it in his pleading?

(b) Bac. Abr. *Pleas*, etc. I. 12. (1. 2.); Hob. 217; Show. P. C. 221.

(c) Generally, application to the *court*, for an order of *oyer*, is seldom, or never made, except in cases where the *right* to it, on the part of him, who demands, it, is questioned. In other cases the copy is usually given voluntarily, by the attorney of him, who pleads the deed, to the attorney of the adverse party, on the latter's private request, without the intervention of the court. (1 Tidd, 518; 2 T. R. 40; Steph. Pl. 87.)

(d) Bac. Abr. *Pleas*, etc. I. 12. (2.) *in marg.*; 2 Lill. Ab. 336.

(e) 2 T. R. 40; Com. Dig. *Pleader*, P. 1; Barnes, 245.

It has already been stated that he, who pleads *a deed, and makes title under it*, must plead it with a *profert*. For the deed being, in every such case, *the foundation* of the pleader's suit, or defence, is therefore a matter, which the adverse party should have an opportunity to answer, directly upon the *record*; which, however, he cannot do, without having obtained *oyer*.(f)

As a general rule, *profert* is required of no other instruments than deeds: these being the only private writings, which, by the original principles of the common law, are considered as *instruments*, on which an action or defence can be *directly* founded. And consequently, he who pleads a writing, *not under seal*—as a bill of exchange, promissory note, or other *unsealed* written agreement—is not bound to make *profert* of it.(g)

For written contracts not under seal, are regarded by the common law, not as *instruments*, on which actions are founded; but merely as *simple* contracts, or, (more precisely) as *evidence of parol contracts*.(h)

Of such instruments, therefore, *oyer* is not demandable.

Yet, as it has been customary, under the practical extension of the law-merchant, in modern times, to count upon bills of exchange and promissory notes, as *instruments*; it

(f) 1 Keb. 513; Hutt. 33; 1 Saund. 317. (n. 2.); Bac. Abr. *Pleas*, etc. I. 12. (2); 2 Ld. Ray. 1135; 2 Black. R. 1108; 1 Stra. 227, 2 Saund. 60. (n. 3.) 366; (n. 1.) 409, 410.

(g) 3 Lev. 205; Com. Dig. *Pleader*, O. 3. P. 1; 1 Sid. 386; Bac. Abr. *Pleas*, etc. I. 12. (2.); Chitt. on Bills, 185. [*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Anderson v. Prince*, (W. Va.) 55 S. E. 656. In some states, however, unsealed instruments are put by statute on the same footing with sealed instruments. So in Tennessee. *Whitenton Mfg. Co. v. Memphis & Ohio Riv. Packet Co.*, 21 Fed. 896. The instrument which is the foundation of the action, whether sealed or unsealed, must be set out in the complaint, or, by copy, annexed thereto].

(h) 7 T. R. 351. n; 7 Bro. P. C. 550; 1 Salk. 215; 2 Black. Com. 465-6; Rob. on Fr. Conv. 99; 1 Pow. on Cont. 332-3. 341; Chitt. on Bills, 9.

has become a practice, for the court, on the prayer of the defendant, to order a *copy* of such instrument, when declared upon, to be delivered to him, before he is obliged to plead.(i)

In this practice, however, the defendant, it seems, cannot *found his plea* upon a recital of the copy on the *record*: since this can be done, only on *oyer*;(j) which is the technical, and only mode, in which the party, against whom an instrument is pleaded, can avail himself of anything in it *by plea*.

Nor is *profert* necessary, of a *will*, or an *award*, though *under seal*.(k)

For neither of these instruments is a *deed*; and a seal neither constitutes an essential part, nor changes the legal character, of either of them.

Of *records*, properly so called, *profert* is not required to be made.(l)

For records are *public* property, deposited and kept for public use, in public offices, designated for that purpose; and are, therefore, not removable for the convenience of individuals, nor subject to their control.

But the general rule, that *profert* need be made of no other instruments than deeds, is subject to an exception, in actions brought by *executors or administrators*, as such—in which cases, *profert* must be made of the *letters testamentary*, or *letters of administration*, by virtue of which the plaintiff asserts his right to bring the suit.(m)

These letters, though not strictly *deeds*, being writings to

(i) Tidd, 532; Vide Com. Dig. *Pleader*, P. 1; 1 Salk. 215.

(j) 1 Keb. 513; Hutt. 33; Bac. Abr. *Pleas*, etc. I. 12 (2.)

(k) Com. Dig. *Pleader*, O. 3. *Arbitrament*, I. Sty. 459. 3 Calnes' R. 256.

(l) Co. Litt. 225. Tidd, 529. Bull. N. P. 252. 1 T. R. 150. Lawes' Pl. 97. 8 Wheat. 691. [*Nyladh v. Horterius*, 41 Fed. 120; *Gardner v. Henry*, 45 Tenn. 458].

(m) Com. Dig. *Pleader*, O. 3. Hob. 33. 1 Roll. Ab. 78. 1 Stra. 412. Vid. 11 Mass. R. 314.

which a seal is essential, and on which the plaintiff *founds his title* to prosecute the action.

A party may sometimes, *in evidence*, make title under a deed, without *pleading it*; and whenever he may, and does, take this course, no *profert* need, or can, be made of it.

But where any interest or right, acquired by deed, *could not pass* by the common law, without deed, (as where a party claims, by deed, a thing lying only in *grant*—for example, an *incorporeal* hereditament), he must plead the deed; and if he *founds* his action or defence upon it; he must also, by the first general rule make *profert* of it. The rule is the same, where one pleads a release; because by the common law, a seal is necessary to give effect to it. (n)

Hence also, in *covenant broken*, and in debt too, when founded on specialty, the instrument must be pleaded, and *profert* made of it. (o) For in both cases, the action is *founded* on a deed.

And even though the interest or right, asserted by the pleader, *might pass* without deed; yet if the deed *be pleaded* (though unnecessarily), and title be made under it; *profert* of the deed must, regularly, be made. (p)

For in cases of this kind, the same reasons exist for requiring *profert*, as if the interest could *not* have passed without deed, viz., that the adverse party may have an opportunity to answer, *upon the record*, the instrument, under which title is made against him, *upon the record*: since the deed, in the case here supposed, is not *mere evidence* of the title of him who pleads it; but the *foundation* or *gist* of his pleading. Thus, in the case of a lease assigned by deed, if he, who alleges the assignment, pleads also *the deed* (though un-

(n) 5 Co. 38. a. b. 43. b; Bac. Abr. *Pleas*, etc. I. 12. (1.); 1 Bulstr. 119; 2 Salk. 519; Cro. Car. 143; 2 Wils. 376; Cro. Eliz. 571; 2 Stra. 814.

(o) Cro. Eliz. 571; 1 Saund. 276. (n. 1.)

(p) Bac. Abr. *Pleas*, etc. I. 12. (1.); Lawes' Pl. 97; 2 Mod. 64.

necessarily); and founds his action or defence upon it; he must plead it with *profert*—though he was under *no* necessity of *pleading* the deed.

EXCEPTIONS.—1. But where one pleads a deed of any kind, *without making title under it*, he is not bound to make *profert* of it: as where a deed is pleaded, merely as *inducement* to the action or defence. (q)

And therefore, in an action for *disturbance of a right of way*, (*which lies in grant*,) if the plaintiff pleads the deed, under which he claims the right; he is not bound to make *profert* of it. (r)

For the *gist* of the action is the *tort* complained of; and the right of way only *inducement*, to which it is neither necessary nor proper for the defendant to plead; although he may contest it, in *evidence*.

2. Exceptions to the general rule are founded on the pleader's actual, or presumed *inability to produce* the instrument. (s)

For the rule requiring *profert* of a deed, in any case, presupposes or presumes, that the pleader has the *possession or control* of it. (t)

(q) 6 Co. 38. a. b; 10 Ib. 92; 1 Saund. 276. (n. 1.); Bac. Abr. *Pleas*, etc. I. 12. (1.); 8 T. R. 573; 1 Chitt. Pl. 476-7; 2 Ib. 174. n. (z.) [*Langhorne v. Richmond Ry. Co.*, 91 Va. 369; *Whittenton Mfg. Co. v. Memphis & Ohio Riv. Packet Co.*, 21 Fed. 896.

So also under the modern rule requiring writings which are the foundation of the action to be exhibited. *Hoop v. Abbeville Inv. & Const. Co.*, 108 Ga. 168.

In an action on coupons no *profert* of the bonds is necessary. *New London City Bank v. Ware River Rd. Co.*, 41 Conn., 542; *Nashville v. Potomac Ins. Co.*, 2 Baxt. 296].

(r) *Id.*; 2 Lill. Ab. 394; Palm. 387; Cro. Jac. 673.

(s) When he, who makes title under a deed, in pleading, is *party* or *privity* to it, he is presumed to have the control of it, until the contrary is shown. But a *stranger* to it is, in general, presumed unable to produce it.

(t) 10 Co. 93-4; Bac. Abr. *Pleas*, etc. I. 12. (1.); Carth. 316; Cro. Car. 441; 1 Ves. 389; Com. Dig. *Pleader*, O. 8 [And see, *Dangerfield*

Hence, a *stranger* to a deed may, in general, plead it, and make title under it, *without profert*. Thus if a grant, by deed, is made to A., to *the use of B.*; the latter may plead the deed, without *profert*; though he deduces his own title from it: because he is supposed not to have the control of it.(u)

Thus also, and for the same reason, one who claims title, accruing by *operation of law*, under a deed to another, may plead the deed, without *profert*: as where, in a writ of *dower*, the demandant pleads a grant to her deceased husband, of the subject in which she demands dower.(v)

Yet a tenant *by the curtesy*, who pleads a deed, to which his deceased wife was party, and makes title under it, must make *profert* of it; though he comes in by *operation of law*: because he is presumed to *have possession* of her muniments of title, and may retain them, during his life.(x)

So also where a *servant* justifies, under a deed to his *master*, without alleging any right or interest in himself, he must make *profert* of the deed.(y) For the master's title is the *gist* of the defence: and the servant standing in, and voluntarily assuming his *master's place*, and in the character of his *representative*, must plead the deed, as the master himself would be required to do, if *he* were defendant.

3. That the deed pleaded is in the hands of the *adverse party*, or has been *destroyed* by him, dispenses with the necessity of making *profert* of it, when *profert* would other-

v. *Thomas*, 9 A. & E. 298; *Bain v. Cooper*, 8 M. & W. 753, per Parke, B.J.

(u) Com. Dig. *Pleader*, O. 8; Cro. Jac. 217; Carth. 316; Cro. Car. 441.

(v) Co. Litt. 225; Bac. Abr. *Pleas*, etc. I. 12. (1.); 5 Co. 75; Com. Dig. *Pleader*, O. 8.

(x) Co. Litt. 226. a. Bac. Abr. *Pleas*, etc. I. 12. (1.); 10 Co. 94; Com. Dig. *Pleader*, O. 9.

(y) 10 Co. 92. a; Com. Dig. *Pleader*, O. 5; Co. Litt. 226. a; Cro. Jac. 292; Bac. Abr. *Pleas*, etc. I. 12 (1.)

wise have been necessary. (z) The reason is the same, as under the first general exception, above stated.

4. It also appears, now, and for the same reason, to be established, that when a deed has been *lost* or *destroyed*, by time or casualty, it may be pleaded, and title made under it, without *profert*: (a) though it was formerly supposed, that the only relief against such an accident was in *equity*. (b)

And even of late, this exception to the general rule, in a court of law, has been recognized with apparent reluctance. (c)

FACTS CONSTITUTING EXCUSE MUST BE PLEADED.—It follows from the preceding principles, that when a party, who is presumed to have *the control* of a deed, pleads and makes title under it, he must make *profert* of it, unless the *profert* is dispensed with, in virtue of one of the two last excep-

(z) 5 Co. 75, a; 1 Saund. 9. a. (n. 1.); 3 T. R. 151, 153; 2 H. Black. 259; 1 Chitt. Pl. 349; 2 Ib. 154. n. (k.)

So strict is the rule requiring *profert*, where the party is *entitled* to the possession of the deed mentioned in his pleading, that it has been held insufficient to allege, that "the deed was delivered to the opposite party," without stating that it was then in his possession, or what had become of it. *Wallis v. Harrison*, 4 M. & W. 538. So, where a defendant relied upon a deed, whereby he had assigned his property to trustees for the benefit of his creditors, and the creditors, including the plaintiff, had released him from his debts, the court held that he was bound to make *profert* of the instrument, though he averred in his plea that it was in the possession of the trustees, who refused to deliver it to him for the purpose of bringing it into court. *Hodgson v. Warden*, 13 M. & W. 22; *Hill v. Marsden*, 6 id. 718. Chief Baron Pollock observed in this case, that the refusal of the trustees might render them liable in damages to the defendant, but would not warrant any departure from a rule which was made, not for the vexation of parties, but for very sound reasons. 1 Taylor Ev. 1st ed. § 1285.

(a) 1 Saund. 9. a. (n. 1.); 2 H. Black. 259; Peake Ev. 97. 302. (2d. ed.) [*People v. Pace*, 57 Ill. App. 674].

(b) 1 Ves. 389; 1 Atk. 61; 6 Ves. Jun. 812, 813; 9 Ib. 464; 1 Madd. Ch. 25; 1 Ridgway's Rep. 361.

(c) 10 East, 55.

tions; and in either of these two cases, he must—in order to justify the omission of a *profert*—allege, in his pleading, the *special facts*, which bring the case within the exception: as that the deed is in the hands of the adverse party, or lost, or destroyed, &c. For if he omits to make *profert*, and assigns no sufficient cause of the omission; his pleading is demurrable. And if he unadvisedly makes *profert*, in such a case; he enables the adverse party to demand *oyer*, and to sign judgment against him, for not giving it, (d) because, having *pleaded* that he brings the deed into court, he cannot, while that allegation remains, *retract* or *deny it*, by proving what might have dispensed with it. Yet, under the law of amendments, the court will, on motion, in the last case, allow the pleader of the deed to *amend* his pleading, by *striking out the profert*, and stating the special facts, which dispense with it (e), with an averment, that by reason of those facts, he cannot produce it.

PARTIES IN PRIVITY.—Whenever an *original party* to a deed would according to the preceding distinctions, have been bound to make *profert* of it, in pleading it, those in *privity* with him must plead it, in the same manner. (f)

Thus if an *heir*, as such, pleads and makes title under a deed to his ancestor; he must regularly make *profert* of it. And the rule is the same, when an *executor* or *administrator* sues upon a specialty, given to his *testator* or *intestate* (g),

(d) 1 Wils. 16; 2 Stra. 1186; 1 Mod. 266; 4 East, 536; 1 Saund. 9. a. (n. 1.) [*Messer v. Smythe*, 58 N. H. 312].

A party to an indenture, with the consent of one of the opposite parties, cut out his own signature. It was held that an instrument so mutilated should not be declared on as a deed, with a *profert*, but the facts should be stated as an excuse for not making a *profert*. *Powers v. Ware*, 2 Pick. 451.

(e) 1 Saund. 9. a. (n. 1.); 1 Wils. 16; 8 T. R. 153. n; *Vid.* 1 Stark. R. 74 (60.)

(f) For the different sorts of *privity*, see Co. Litt. 352; Gilb. Ev. 81; Bull. N. P. 232; 3 Co. 23.

(g) Co. Litt. 267. 317; 10 Co. 92. 94; Bac. Abr. *Pleas*, etc. I. 12. (1.); Com. Dig. *Pleader*, O. 4.

it being presumed that privies possess, or can command, deeds given to those with whom they are in privity.

COURSE OF PROCEEDINGS AFTER PROFERT.—When *profert* of a deed is required by law, and is actually made, the adverse party, as has been heretofore stated, is entitled to *oyer* of the deed; but if *profert* is made *unnecessarily*, and the pleader does *not make title* under the deed, (as where it is pleaded only as *inducement*); *oyer* of it is not demandable. (h) The *profert*, in such a case is *surplusage*. For the deed, being but *inducement*, cannot be the proper subject of any answer or notice, in *the pleading* of the adverse party.

He who is entitled to, and obtains, *oyer* of a deed, is not bound to take any notice of it in his pleading(i), the object of granting it being merely to *enable* him to do so, at his pleasure. He *may*, however, after reciting the instrument, *verbatim*, on the record, avail himself of any advantage, which any part of it, not set out by his adversary, may afford him. The mode, in which such advantage may be taken, may be either by pleading, or demurring, as the case may require. Thus, to debt on bond, the defendant, after reciting the condition, on *oyer*, may plead performance, or tender of performance, of the condition; or any illegality in the contract, not appearing on the face of the instrument; or any other extrinsic fact, which may defeat a recovery on the bond.(j)

Or if the instrument sued upon, or upon which the defence is founded, is, upon *the face of it*, *void*, either from illegality, or otherwise; or is, from any other cause, *insufficient*, upon *the face of it*, to maintain the demand or defence founded upon it; or if there is any material *variance* between

(h) Tidd, 529; 2 Salk. 497; Lawes' Pl. 96, 97; Doug. 476-7; 8 Wheat. 695.

(i) Lawes' Pl. 98; 2 Stra. 1241; 1 Wils. 97; Com. Dig. *Pleader*, P. 1.

(j) 3 Black. Com. 299, 300; Bac. Abr. *Pleas*, etc. I. 12. (2.); Lawes' Pl. 98, 99; 6 Mod. 28.

the instrument, as recited on *oyer*, and the description of it in the pleading of him, who has made *profert* of it; the adverse party may *demur* to the pleading in which the *profert* is made. (k)

For in the two first cases, the voidness or insufficiency of the instrument, and in the last, the variance, will, from the recital, appear upon *the record*; and the deed, as recited, is considered as parcel of *the pleading* of him, who pleads it; and consequently, has the same effect, as if it had been set out, *verbatim, in his own pleading.* (l)

But if the party, who has obtained *oyer* of a deed, and who professedly sets it out upon the record, recites it *falsely*, or omits to recite *the whole* of it; he who pleaded it may relieve himself of the effect of the misrecital, in either of two ways. Thus, 1, he may *sign judgment*, as for want of a plea. For he, who undertakes to set out his adversary's deed, on *oyer*, is permitted to do so, only on the implied *condition*, that he recite it *truly*, and *in full*. And his failure, in either of these particulars, being a *breach* of this condition, has the same effect, as the failure of a party to *plead* in his proper turn. Or, 2, the pleader of the deed may, instead of signing judgment, pray that this deed may be *enrolled* upon the record, by a proper officer of the court; and on its being truly enrolled, may *demur*—as the misrecital, or omission, will, on the enrollment, appear *upon the record.* (m)

On *profert* made, the awarding of *oyer*, when it is not of right demandable, is *not error*; but denying it to a party, legally entitled to it, is. (n)

(k) Hob. 217; 1 Saund. 317; 2 Ib. 366. (n. 1.); Com. Dig. *Pleader*, P. 1; Bac. Abr. *Pleas*, etc. I. 12. (2.); 2 Wils. 342; Lawes' Pl. 99.

(l) Id.

(m) 4 T. R. 370; 1 Saund. 9. b. (n. 1.) 316, 317; Carth. 301; Com. Dig. *Pleader*, P. 1; Stra. 227. 1241; Lawes' Pl. 100, 101; 1 Wis. 97; 1 Chitt. Pl. 418; 2 Ib. 461. n. (m.) (n.)

(n) 2 Salk. 498; 2 Lill. Ab. 338; 1 Saund. 9. b. (n. 1.); 1 Chitt. Pl. 417; Lawes' Pl. 99; 2 Mass. 494.

For the ordering of *oyer* is supposed to have been of *no prejudice* to the party giving it; but the refusal of it is presumed to have been *injurious* to him who demanded it; as he is supposed to have been unable to plead, advantageously, without it.

But in order to take advantage of the error, in the latter case, the party praying *oyer*, must either enter his prayer *upon the record*, to the intent that the error may be there apparent; or file a *bill of exceptions*, by which the same end may be attained. (o) The former, however, appears to be the usual course.

And when a prayer of *oyer* is entered upon the record, it is in nature of a *plea*; to which the opposite party may *counterplead or demur*, as the case may appear to require; and on which the court will give judgment, awarding or refusing *oyer*, as upon an interlocutory plea. (p)

OMISSION TO MAKE PROFERT IS GROUND OF DEMURRER.—If *profert* of an instrument, when required by the rules of pleading, be omitted; the omission, according to the preponderance of authority, is, by the common law, matter of *substance*, and fatal on *general demurrer*. (q)

Inasmuch as it deprives the adverse party of the benefit of *oyer*, without which he is supposed to be unable to plead advantageously. But by the statute 16 and 17 Car. 2, c. 8, the omission is cured by *verdict*; and by that of 4 & 5 Anne, c. 16, it is aided, except on *special demurrer*. (r)

6. THE PLEA.—These preliminary proceedings on the part of the defendant, being had, it is incumbent on him to

(o) Bac. Abr. *Bill of Exceptions*; 2 Inst. 427.

(p) 2 Salk. 498; 1 Saund. 9. b. (n. 1.); Lawes' Pl. 99; 2 Ld. Ray. 969.

(q) Com. Dig. *Pleader*, O. 17; 10 Co. 94; Cro. Jac. 292, 409, 412; Hob. 83; Cro. Eliz. 551; 3 Bulstr. 223—*Dub.*; 1 Leon. 300, 310; *Cont.* 2 Salk. 497. [*Marble Company v. Black*, 89 Tenn. 118].

(r) Com. Dig. *Pleader*, E. 29. O. 17; Bac. Abr. *Pleas*, etc. I. 12. (1.)

put in his plea;(s) in which, if he has waived no legal exception, he may either contest the *merits* of the plaintiff's

(s) 3 Black. Com. 301.

[Under the codes the only pleadings on the part of the defendant are the demurrer and answer. See *N. Y. C. C. P.*, § 487. The former raises only questions of law; the latter, questions of fact. A so-called answer raising only questions of law must be regarded as a demurrer. *Kelley v. Downing*, 42 N. Y. 71, 77; *Railroad Company v. Gibbs*, 23 S. C. 370.

THE ANSWER must contain every defense relied upon by the defendant to defeat the action. Generally, the answer is the appropriate medium for presenting issuable facts either in abatement or in bar of the action. *Christian v. Williams*, 111 Mo. 429, 443; *Tutty v. Ryan*, (Wyo.) 78 Pac. 657 [citing 2 Abb. Tr. Brief on Pleading, 999-1001]; *Sweet v. Tuttle*, 14 N. Y. 465; *Gardner v. Clark*, 21 N. Y. 399.

A defendant may set forth in his answer as many defenses, or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense must be separately stated and numbered. New York Code Civ. Proc. § 507.

A defense should commence with some appropriate words, but no formal commencement for a separate defense is necessary beyond some such words as "and for a further defense." *Lippincott v. Goodwin*, 8 How. Pr. 242; *Benedict v. Seymour*, 6 How. Pr. 298. But each separate defense must be separately stated, and must be complete in itself. *Royal Bank v. Goldschmidt*, 51 Misc. (N. Y.) 622.

Defenses are of two kinds: 1, Those which deny some material allegation on the part of the plaintiff; 2, Those which confess and avoid these allegations. *Donovan v. Main*, 74 App. Div. 44, and cases cited. So a denial is a defense, and should have first place in the answer, and, moreover, it should be separate from new matter affirmatively alleged. *Staten Island Midland R. R. Co. v. Hinchcliffe*, 34 Misc. 49, 170 N. Y. 473.

Part payment is an example of an affirmative defense. (*Houghton v. Townsend*, 8 How. Pr. 441). And so is the defense of the statute of limitations (*Grey Lith. Co. v. Am. W. T. D. Co.*, 44 Misc. 306).

The answer may set up an equitable defense. Thus, for example, in an action on a contract, the defendant may ask, in effect, for a reformation of the contract. *Madison v. Benedict*, 73 App. Div. 112.

In some states, if the defendant seeks affirmative relief he may file a cross-complaint with his answer, or, with the permission of the court, subsequently. The party served may then demur or answer as if to an original complaint. *Idaho C. C. P.*, § 3452. In

demand, or except to the *jurisdiction* of the court: or take advantage of any legal defect, incongruity or informality in the *mode*, in which the suit has been commenced or pursued. And hence arises the division of pleas, on the part of the defendant, into two kinds, viz.: *dilatory* pleas, and pleas to *the action*; (t) the different characters and uses of which are to be explained hereafter.

WHERE PLEA CONTAINS NEW MATTER.—If the plea—of whichsoever of the two foregoing kinds it may be—advances *new matter*, it may of course be met by the plaintiff, in either of the three modes, in which (as has been shown already) new matter, advanced on either side, may always be contested. (u)

C.—THE REPLICATION.—The plaintiff's answer to the plea is called the *replication*. (v)

some states if the answer asks for affirmative relief, as it may, it is styled the cross-petition. *Tutty v. Ryan*, (Wyo.) 78 Pac. 657.

By § 509 N. Y. C. C. P., the answer must demand an affirmative judgment if the defendant deems himself entitled to it by reason of his counterclaim].

(t) Bac. Abr. *Pleas*, etc., A.

(u) 3 Black. Com. 309, 310.

(v) [The term used in the codes is "reply." In some of the code states no reply is allowed. So in California where one is supplied by operation of law, for all new matter in avoidance or constituting a defense or counterclaim is deemed controverted. *Moore v. Copp*, 119 Cal. 429, 433, citing Cal. Code Civ. Proc. § 462. In Wisconsin any allegation of new matter not pleaded as a counterclaim is deemed at issue without a reply. *Payne v. Payne*, 129 Wis. 450.

In *Connecticut* the pleadings allowed are a complaint, a plea to the jurisdiction or in abatement, or an answer or demurrer; to which the plaintiff may demur or reply. There can be no further pleadings except by leave of court. In some states the pleadings are designated as petition, demurrer, answer (which, when affirmative relief is asked may be styled a cross-petition), reply. See *Tutty v. Ryan*, (Wyo.) 78 Pac. 657.

In *Massachusetts*, ordinarily, no pleading is required after the answer, but the statute authorizes a replication stating facts in reply to new matter set out in the answer. But new matter set up in the answer in avoidance of the action is deemed denied unless the court

D.—SUBSEQUENT PLEADINGS.—The regular stages or parts of the pleading, which succeed the replication are the

orders a reply stating the part admitted or denied. *Moore v. N. W. Mut. Life Ins. Co.*, (Mass.) 78 N. E. 488.

In New York the plaintiff may reply if the answer contains a counterclaim. New York Code Civ. Proc., sec. 514. New matter may be set up in reply to a counterclaim if not inconsistent with the complaint. *Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181.

It has been held in New York that a reply cannot be used to set up plaintiff's counterclaim to a demand set up in the answer; that in such a case the plaintiff must move to amend his complaint. *Fett v. Greenstein*, 46 Misc. 574. On the contrary, it has been held elsewhere that it is no departure to reply a set-off to a set-off or a counterclaim to a counterclaim. *Small v. Kennedy*, 137 Ind. 299; *Babcock v. Maxwell*, 29 Mont. 31) for this defeats the answer and leaves the cause of action intact.

Under the codes the answer of new matter which requires a reply is in the nature of confession and avoidance. *Kinkead v. McCormack Harvesting Machine Co.*, 106 Iowa 222; *Olson v. Tvette*, 46 Minn. 225. In New York there can be no reply to an answer which does not contain a counterclaim, unless such answer contains new matter constituting a defense by way of avoidance, in which case the court, in its discretion, may order a reply in response to the defendant's application. New York Code Civ. Proc. sec. 516; *Devlin v. Bevins*, 22 How. Pr. 290. Only the defendant can ask for a reply, and the motion will not be granted as a matter of course. The motion is addressed to the discretion of the court, which will act under the direction of the statute and according to the facts of the particular case. The purpose is to simplify the issues and prevent a surprise, and it must appear that the ends of justice will be promoted. *Hallenberg v. Greene*, 87 App. Div. 259; *Toplitz v. Garrigues*, 71 App. Div. 37. Accordingly no hard and fast rule can be laid down applicable to all cases. *Timble v. Russell*, 41 Misc. 577.

As has been indicated above the court will consider, among other things, whether there may be a surprise without a reply. But this is not the only question. It is not an abuse of discretion to bring up for settlement in advance of the trial some question of law. *Cavanagh v. Oceanic Steamship Co.*, 30 N. Y. St. 532.

The discretion to order a reply is usually exercised where the new matter is of such a character as to indicate that if true it will constitute a defense to the action. *Seaton v. Garrison*, 116 App. Div. 301. A reply is not necessary where the new matter in the answer does not constitute a defense. *Hickey v. Anheuser-Busch*

rejoinder, which is the defendant's answer to it—the *surrejoinder*, which is the plaintiff's answer to the rejoinder—the

Brewing Asso., (Colo.) 85 Pac. 838; *Modern Steel Struct. Co. v. English Const. Co.*, (Wis.) 108 N. W. 70.

The court will consider whether the new matter in the answer is equivalent to a denial or operates as an avoidance. A reply will not be ordered if such matter can be proved under a general denial. *Johnson v. Andrews*, 34 Misc. 89; *City of Burton v. Savings Bank*, 28 Kan. 390; *Mauldin v. Ball*, 5 Mont. 96. Nor is it necessary to reply to affirmative allegations that are equivalent to a denial (*Engel v. Bugbee*, 40 Minn. 492; *Van Gieson v. Van Gieson*, 12 Barb. 520), or that amount to a conclusion of law. (*State v. Williams*, 77 Mo. 463). And a reply will not be ordered where the answer contains a general denial and separate statements amounting to a special denial. *Burr v. Union Surety and Guaranty Co.*, 86 App. Div. 545.

A reply will not be ordered to an answer which goes to a portion only of the plaintiff's claim (*Deering v. City of New York*, 51 App. Div. 402), nor when the only object would be to relieve the defendant from the necessity of proving facts which he sets up as new matter (*Mercantile Nat. Bank v. Corn Exchange Bank*, 73 Hun. 78). An answer in an action in tort which alleges former recovery against a joint tort-feasor sets up matter in avoidance, not a counterclaim, and does not call for a reply. *Rice v. Thompson*, 111 App. Div. 316.

The plaintiff may properly allege in his reply facts which estop, or at least deny to the defendant the right to avail himself of a defense set up in the answer. *Paxton Cattle Co. v. First National Bank*, 21 Neb. 621, 645. Thus in an action on a promissory note where the defendant answers fraud and want of consideration, the plaintiff may reply a former adjudication. *Fanning v. Insurance Co.*, 37 Ohio St. 344.

It has been held that the reply must point out specifically the new matter of the answer which the plaintiff denies. *Betz v. Telephone Co.*, 121 Mo. App. 473. Other courts hold this to be unnecessary in view of the code provision that pleadings are to be liberally construed. *Modern Steel Struct. Co. v. English Construct. Co.*, (Wis.) 108 N. W. 70.

By omitting to reply to an answer setting up a counterclaim the plaintiff does not waive the objection that the matter alleged does not give the right to a counterclaim. *Stevens v. Orton*, 18 Misc. 538, 545.

If the reply is insufficient the remedy is a demurrer or a motion to strike out. But a bad reply is good enough for a bad answer: in

manner, a good *rebutter* consequently fortifies the *plea*: since it goes directly in support of the rejoinder, which directly supports the plea.

The dereliction of the first ground of complaint or defence, and the substitution of another in violation of these principles, constitute what is called a *departure* in pleading; for a particular explanation of which, and of its consequences, the reader is referred to a subsequent chapter.(c)

IV.—KINDS OF PLEAS.—Pleas on the part of the defendant as has been already suggested, are of two kinds:

A. *Dilatory* pleas;

B. Pleas to the *action*.(d)

The latter are usually called pleas in *bar*; though sometimes, and especially in the older books of the law, they are denominated *perpetual* or *peremptory* pleas, or pleas in *chief*.(e)

A. DILATORY PLEAS. 1. *Definition*. These are such as delay the plaintiff's remedy, by questioning, not the cause of action, but the *propriety* of the suit, or the *mode* in which the remedy is sought. And hence they derive the denomination of *dilatory pleas*.(f)

Sir William Blackstone defines dilatory pleas to be 'such as tend merely to delay, or put off *the suit*.'(g)

subsequent pleadings, on the plaintiff's part, must go in support of the *writ*, and not of the *declaration*.

(c) A lawyer wishing to understand his case, and to know how to try it,—(even in code states,) will find no surer method, than to examine it in the light of what *would be* his pleadings under a scientific common-law system. This would insure him against a *departure* from the foundation of his claim;—an error which, discovered on the trial, might be fatal in more respects than those of mere form.

(d) 3 Black. Com. 301. Bac. Abr. *Pleas*, etc. A.

[This distinction exists under the code. *Rawson v. Guiderson*, 6 Iowa 507].

(e) Co. Litt. 304. a. Lawes' Pl. 36. Com. Dig. *Abatement*, B.

(f) Reg. Pl. 76. 3 Black. Com. 301.

(g) 3 Black. Com. 301.

It would, perhaps, be more correct to say, that they tend to delay the plaintiff's *eventual remedy*. For though pleas of this kind were, formerly often used for the mere purpose of delay, without any foundation in truth; and though the interlocutory questions, raised by such a plea, may still incidentally have the mere effect of *delaying* the termination of the suit; yet the proper and direct effect of a plea of this kind, when it prevails, is in general, and with a very few exceptions, to *defeat* forever the particular suit, in which it is used: (*h*) though it leaves the *merits*, or right of action, undetermined; so that the plaintiff is still at liberty to seek his remedy, by a new suit. The peculiar office of a dilatory plea is therefore, in general, to *defeat* the individual suit, in which it is pleaded without affecting the *right of action*.

All dilatory pleas are sometimes called pleas in *abatement*, as contradistinguished from pleas to the action. This, however, is a vague use of the term, and is never proper when strict accuracy is required. (*i*)

2. KINDS OF DILATORY PLEAS.—Dilatory pleas are, by Sir William Blackstone, divided into three kinds:

a, Pleas to the jurisdiction of the court: as that the defendant is privileged to be sued, exclusively, in some other court; or in some cases, that the cause of action arose without the limits of the court's jurisdiction. (*j*)

b, Pleas to the *disability* of the plaintiff, or as they are frequently termed, to the *person* of the plaintiff: as, that he is an alien enemy, an outlaw, or under some other legal incapacity to maintain a suit. (*k*)

c, Pleas in *abatement* of the writ, or count. Pleas of this last class are founded upon some defect or mistake, either in

(*h*) Bac. Abr. *Pleas*, etc. F. 14. 9 Black. Com. 303.

(*i*) 3 Black. Com. 302. *Notis Chr. Lawes'* Pl. 37.

(*j*) Bac. Abr. *Pleas*, etc. E. Ib. *Courts*, D. Glib. H. C. P. 188. 189. 3 Black. Com. 301.

(*k*) Bac. Abr. *Pleas*, etc. F. 1. Co. Litt. 128, a. 129, b.

[See *Needham v. Wright*, 140 Ind. 190].

the writ itself—(as that it is deficient in some legal requisite, or that the defendant is *misnamed* in it, &c.)—or in the mode, in which the count *pursues* it: as that there is some *variance*, or *repugnancy* between the count and the writ; in which case, the fault in the *count* furnishes a cause for abating the writ.^(l) But any mistake or insufficiency, apparent upon the face of the *declaration*, (or count) *without reference* to the writ—i. e. any mistake or insufficiency, in the *statement of the cause of action*, is in itself no ground of abatement, though a good cause of demurrer.^(m)

B. PLEAS TO THE ACTION.—1. If no dilatory plea is offered—or if any or all of those, which the law allows, have been pleaded and overruled as insufficient; the defendant is still at liberty to plead, to the action, or in bar.⁽ⁿ⁾ For it would be unreasonable to render a final judgment against him, until he has been required to answer, and has had opportunity to contest the *merits* or *grounds* of the suit: and these he is not bound to answer, until he has exhausted, or *waived* his right to interpose dilatory exceptions.

On the other hand, the defendant, by pleading to the action, *waives* all dilatory pleas, except those, the matter of which has *afterwards accrued*.^(o) For by denying the

(l) 3 Black. Com. 301; Com. Dig. *Abatement*, G. 1. 8. *Ib. Pleader*, C. 14, 15; Bac. Abr. *Pleas*, etc. F. 7. [*Pitts Sons Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 587; *National Parlor Furniture Co. v. Strauss*, 75 Ill. App. 276; *Winer v. Mast*, 146 Ind. 177].

(m) Willes, 410; 1 Show. 91; 1 Salk. 212; 1 Mass. 500.

Most writers on pleading have treated of dilatory pleas, under a more minute and complex division, which will be presented in a subsequent chapter. But the *three-fold* division, mentioned above, will here be pursued, as being not only more simple, and more easily understood; but sufficiently minute for the ends proposed in this Treatise.

(n) Co. Litt. 303. a. Bac. Abr. *Pleas*, etc. A. 3 Black. Com. 303.

(o) Co. Litt. 303. a. Bac. Abr. *Pleas*, etc. 2. 1 Tidd, 572.

cause of action itself he tacitly admits the *mode* in which the remedy is pursued, to be correct.(p)

2. DIVISIONS OF PLEAS TO THE ACTION.—These pleas are usually divided into two kinds:

a, The *general issue*;

b, A *special plea in bar*.(q)

c, There is however a plea to the action, which does not strictly fall under either of these two denominations, and which is called a *special issue*(r), a plea termed *special*, as distinguished from the *general issue*; but which differs also from what is appropriately denominated a '*special plea in bar*,' in this—that the latter is, universally, a plea *advancing new matter*: whereas the plea, called a *special issue*, never advances such matter; but merely *denies* some particular *material* allegation, the denial of which is in effect a denial of the entire right of action.(s)

These several pleas are called, indifferently, pleas *to the action*, pleas *in bar*, or pleas *in chief*.

3.—MANNER OF DENYING THE RIGHT OF ACTION.—A

(p) The *principle* here stated, must still be true. A plea to the *jurisdiction* is a *dilatory* plea, but it is not a plea *in abatement*. And there seems abundant reason, why even an answer, under the Code, cannot set up a want of jurisdiction either *with* or *after*, an answer in abatement, or (on the merits) in bar. The latter answers *admit* the jurisdiction. The case in 4 Kern. 465, does indeed decide that matter of *abatement*,—(in that case the non-joinder of parties, plaintiffs,)—could be set up in the same answer with other defences, on the merits. That, however, was by a bare majority of a divided court: And the case by no means goes the length of allowing any other defence to be *submitted* to a court, *with* an answer *to the jurisdiction*,—which is an *absolute denial* of the right of the court to hear the case, at all. [See *infra*, Plea to the Jurisdiction. [*Draper v. Town of Springport*, 15 Fed. 328.]

(q) 3 Black. Com. 303. 305. Bac. Abr. *Pleas*, etc. G. 1, 3.

(r) Bac. Abr. *Pleas*, etc. G. 3. Com. Dig. *Pleader*, R. 1. 2. Lawes' Pl. 110. 112.

(s) [*Kimball v. Railroad Co.*, 55 Vt. 95, 97.]

plea to *the action*, being an answer to the *merits* of the complaint, always goes in denial of the alleged *right of action*. And this the defendant may deny, either *(t)*

a, By *denying*, in whole or in part, the allegations in the declaration; or,

b, By alleging new matter, which *admits* the truth of the plaintiff's allegations, but goes *in avoidance* of them; or,

c, By pleading matter of *estoppel*: a defence which neither admitting nor denying any of the facts alleged by the plaintiff, denies his *legal right to allege* them.

a. DENIAL OF ALLEGATIONS OF DECLARATION.—When the defendant proposes to deny *all* the material allegations in the declaration, his proper plea is the *general issue*. But if the cause of action consists of several distinct, but connected facts, capable of being separated in pleading; the defendant, instead of denying them all, by the general issue, may deny singly, any one of them, which is *essential* to the plaintiff's right of recovery, without taking notice of the other: and such denial is a sufficient answer to the whole declaration. *(u)* For where each of several concurring facts is necessary to one entire cause of action, the denial of *either* of them is, necessarily, a denial of the *whole* cause of action. The plea, in this case, is a *special issue*. *(v)*

b. NEW MATTER IN AVOIDANCE.—When the defence, upon which the defendant is to rely, does not involve a *denial* of any of the material allegations in the declaration, he may still deny the right of action by pleading, matter of *avoidance*; i. e. *new matter*, which admits the declaration to be true, but shows, nevertheless, either that the defendant was *never* liable to the recovery claimed against him, or that he

(t) 3 Black. Com. 303. 308. Lawes' Pl. 37-8. 115-6. 130. 3 East, 346, 365. Willes, 13.

(u) Bac. Abr. *Pleas*, etc. G. 3. Lawes' Pl. 113. 135. Com. Dig. *Pleader*, R. 1. 2.

(v) Idem.

has been *discharged* from his original liability, by something supervenient.(w) In either case, the plea is a *special* plea in bar.

c. NEW MATTER IN ESTOPPEL.—A plea in *estoppel*, when pleaded to the declaration is also a special plea in bar. A plea of this kind, like a plea in *avoidance* of the declaration, always advances new matter; but it differs from the latter, in this—that instead of confessing and avoiding the plaintiff's *allegations*, it neither admits nor denies them; but alleges some matter of *estoppel* (as a record, or deed, to which he is a party, or privy), and which, being inconsistent with his allegations, *precludes* him from availing himself of them.(x)

(w) 1 Tidd, 590. Lawes' Pl. 115.

(x) 3 Black. Com. 308. Willes, 13; 3 East, 346. 265.

[What is alleged as matter of estoppel must be traversable and material. *Whittemore v. Stephens*, 48 Mich. 573.

This plea is not, strictly speaking, a plea in bar which must either deny or admit and avoid the allegations of the declaration, but as it is a plea to the action it is usually spoken of as a plea in bar. *City of East St. Louis v. Flannigan*, 34 Ill. App. 601.

At common law, like pleas in abatement, this plea had a formal commencement and conclusion to mark its special character and quality and to distinguish it from an ordinary plea in bar. *Whittemore v. Stephens*, 48 Mich. 573.

Forms of the plea under the modern procedure may be found in *Hewitts' Appeal*, 53 Com. 25; *Evans v. Kunze*, 128 Mo. 670, 674].

"The principle of estoppel is that, whether there be a cause of action or not, the party *cannot allege* it." (Coleridge, J., in *Parker v. Smith*, 15 Q. B. 312.) "It is a doctrine which is to be found in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained,—he cannot question the legality of the act he had so sanctioned,—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct." Lord Campbell, C., in *Cairncross v. Lorimer*, 3 Macqueen, 829.

Estoppels are usually divided into three classes; namely, those by

C. DEMURRERS.—There is still, however, another mode, in which the defendant may deny the plaintiff's right of

matter of record, those by deed, and those *in pais*. 1 Taylor Ev. 8th ed. § 91. The notes to *The Duchess of Kingston's Case* in Smith's Leading Cases, Vol. II. p. 744, 8th Am. ed. contain an elaborate exposition of this very difficult branch of the law. See, also 1 Wms. Saund. 6th ed. 325 a; 1 Wms. Notes to Saund. 578; *Insurance Co. v. Harris*, 97 U. S. 331, 336.

Neither a judgment *inter partes*, nor a deed, will operate *conclusively* as an estoppel, unless the matter of estoppel appears on the record, and is met by a demurrer, nor unless it has been *expressly pleaded* by way of estoppel, at least where an opportunity of so pleading it has been afforded. *Glidden v. Unity*, 30 N. H. 104, 120. If a party having such an opportunity, does not avail himself of it, the court will conclusively presume that he has intended to waive all benefit derivable from the estoppel, and will leave the jury to form their own conclusions from the facts presented to them in evidence. If, indeed, no opportunity has arisen for pleading the matter of estoppel in bar, it would seem, on principle, that an estoppel by record or by deed ought to be binding when offered in evidence; and such is the actual rule in some of the United States. *Gilbert v. Thompson*, 9 Cush. 348; *Eastman v. Cooper*. 15 Pick. 276; *Howard v. Mitchell*, 14 Mass. 241; *Foye v. Patch*, 132 id. 109.

In many cases a judgment is tendered in evidence, not merely to prove its existence and its legal consequences, or to protect the party who pronounced it against legal proceedings, but in order to *conclude an opponent* upon the *facts determined*; and for this purpose the rules which govern the admissibility of the record will vary according to the nature of the judgment. Thus, if it be a *judgment in rem*, it will bind all persons whomsoever; and this too, probably, although it has not been pleaded; but if it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto; and even as against them, it will not, as it seems, be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel. 2 Taylor, Evidence (8th ed.), § 1763; 2 Smith Lead. Cas. (6th Eng. ed.), 698 *et seq.*

[There is no doubt that at common law an estoppel *in pais* need not be pleaded. *Dean v. Crall*, 98 Mich. 591]. Thus for example, if a man were to represent another as his agent, in order to procure a person to contract with him as such, and this person were so to contract, the contract would bind the principal equally with one made by himself, and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. 1 Taylor, Evidence (8th ed.), § 92; *Freeman v. Cooke*, 2 Exch. 662, 5 Dowl. & L.

action; viz., by *demurring to the declaration*—i. e., by confessing the facts alleged in it, but denying that they consti-

189, per Parke, B. And see, *Sanderson v. Colman*, 4 M. & G. 209; *Halifax v. Lyte*, 3 Exch. 446, 6 Dowl. & L. 424. [And this is the rule in Connecticut. *Plumb v. Curtis*, 66 Conn. 155, 173.]

In New York there seems to be some uncertainty. See, *Rogers v. King*, 66 Barb. 495; *Dressler v. Hard*, 6 N. Y. Suppl. 500. But certainly where the facts constituting the estoppel are alleged in the pleading of the opposite party, to plead it is unnecessary. *Terry v. Buck*, 40 App. Div. 419. And even though the estoppel is not pleaded, if evidence sustaining it is put in without objection, the informality is waived. *Carpy v. Dowdell*, 115 Cal. 677, 688; *McDonnell v. De Soto Sav. & Bldg. Asso.*, 175 Mo. 250; *Price v. Hallett*, 138 Mo. 561; *Creque v. Sears*, 17 Hun, 123; *Mfg. Co. v. Arrott*, 135 Fed. 750.

But generally the courts in the code states follow the rule in equity (*Saginaw Suburban R. Co. v. Connelly*, 146 Mich. 395), and hold that all acts, representations, and conduct relied on as an estoppel must be specially pleaded before evidence to establish the same can be received. *DeVotie v. McGerr*, 15 Col. 467; *Hill v. Terrell*, 123 Ga. 49; *McCorkell v. Herron*, 128 Ia. 324; *International, etc., Assn. v. Watson*, 158 Ind. 508; *Deming Inv. Co. v. Shawnee Ins. Co.*, 16 Okla. 1; *Newport Cotton Mill Co. v. Mills*, 103 Tenn. 465, 475. See, however, *Smith v. City of St. Paul*, 72 Minn. 472; *Coleman v. Pearce*, 26 Minn. 123; *Towne v. Sparks*, 23 Neb. 142, 149 (an action of replevin in which, under the general denial, it may be shown that the detention was lawful); *Phillips v. Blair*, 38 Iowa 649 (an action to recover real property under statutory rules peculiar thereto).

Facts constituting the estoppel must be pleaded with particularity. *First Nat. Bank of Tuscaloosa v. Leland*, 122 Ala. 289; *Porter v. Armstrong*, 134 N. C. 447; *Tonkawa Milling Co. v. Tonkawa*, 15 Okla. 672; *McQueen v. Bank*, (S. Dak.) 107 N. W. 208. No inference or intendment in favor of the estoppel will be entertained. *Taylor v. Patton*, (Ind.) 66 N. E. 91.

But if the allegations amount to an estoppel it is not necessary to claim an estoppel in so many words. *Cadematori v. Gauger*, 160 Mo. 352; *Alston v. Connell*, 140 N. C. 485.

And the fact that the party pleads a waiver in terms is immaterial if the facts constitute an estoppel. *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388.

Under the code two defenses are inconsistent and cannot be joined only when proof of one necessarily disproves the other. So when not inconsistent in this sense a plea of estoppel may be joined with a general denial. *Blodgett v. McMurtry*, 39 Neb. 210].

tute, in law, a cause of action.(y) But a demurrer to the declaration is not classed among *pleas* to the action—not only because it may be taken, as well to any other part of the pleadings, as to the declaration; but also because it neither affirms nor denies any matter of *fact*, and is, therefore, not regarded as strictly a *plea*, of any class; but rather as an excuse for *not* pleading.(z) As, however, a demurrer to the

(y) Bac. Abr. *Pleas*, etc. N. 1. 3 Black. Com. 314.

(z) Bac. Abr. *Pleas*, etc. N. 1. [Quoted in *Havens v. Hartford & New Haven R. R. Co.*, 28 Conn. 69, 89].

The proposition, that a demurrer is not strictly a *plea*, is warranted, as well by its form, as its essential nature. For the party demurring, after having averred that the adverse pleading, and the matter contained in it, are 'in no wise sufficient in law,' etc., proceeds to say, that 'he hath no necessity, neither is he obliged, by the law of the land, in any manner to *answer* the same,' i. e. to *plead* to it. (3 Black. Com. App. No. III, § 6. 3 Wils. 292. 2 Chitt. Pl. 678.)

[Broadly speaking the term "pleadings" includes demurrers. *Shepard v. Murray*, 33 Minn. 519; *Welsh v. Blackwell*, 14 N. J. L. 344, 346; *Rosenbach v. Dreyfuss*, 1 Fed. 391, 393. Strictly speaking it does not. Whether it does or not depends on the connection in which the word is used. *Welsh v. Blackwell*, *supra*. For example, under a statutory provision requiring a liberal construction of pleadings a demurrer is not a pleading. *Merrill v. Pefferdine*, 9 Ind. App. 416, 420. And see, *State v. Ryan*, 2 Mo. App. 303, 309.

In a very liberal sense a demurrer is an answer to a complaint, but it can never be held to be included in the term answer unless the context or manifest purpose of the term shows that it was so intended. "Answer and demurrer are distinct pleadings under the code having different offices and different characteristics, one forming an issue of law and the other an issue of fact." So a demurrer is not an answer within sec. 275 of the New York Code of Civil Procedure, which allows the court, where there is an answer, to grant any relief consistent with the case made by the complaint and embraced within the issue. *Kelly v. Downing*, 42 N. Y. 71, 77.

To determine whether a pleading is a demurrer or an answer, it is only necessary to ascertain whether or not it requires that any facts should be proved. *Struver v. Ocean Insurance Company*, 16 How. Pr. 422.

So a demurrer cannot be amended as of course by serving an answer, as can be done in the case of an answer under § 542 of the

declaration is one of the modes of contesting the right of action; there seems to be a propriety in adverting to it, in connexion with *pleas to the action*—although all demurrers are, in their nature, as well as structure, essentially different from all *pleas* properly so called. (a)

N. Y. Code. The object of the statute permitting amendments of course within 20 days is to enable parties to correct mistakes in their pleadings, and even to add to, or otherwise perfect them. "But they must do this *upon the legal lines adopted*. If they demur, they may thus perfect their case on the issue of law. If they answer, they may do likewise with regard to the issue of fact." An answer and a demurrer may be substituted one for the other, but one cannot be amended into the other. "You cannot by amendment change an issue of law into an issue of fact, or an issue of fact into an issue of law." *Cashman v. Reynolds*, 31 N. Y. St. 143.

On an application for mandamus, if the plaintiff takes no issue upon the affidavits of the defendant, and proceeds to argument, and moves for the peremptory writ, that is equivalent to a demurrer: it admits the truth of the defendant's allegations but denies their sufficiency in law to prevent the issuing of the writ. *People v. Supervisors*, 73 N. Y. 173.

A motion to strike out certain portions of defendant's answer may be treated as a demurrer, and, as such, will reach back to the plaintiff's petition. *Paxon v. Talmage*, 87 Mo. 13.

And a motion to dismiss and a demurrer are in legal effect the same. *Cofer v. Rising*, 153 Mo. 633.

That the plaintiff, in objecting to the sufficiency of the answer, mistakenly calls his demurrer a reply does not change the legal effect. *Rice v. State*, 16 Ind. 297. And see, *Railroad Company v. Gibbs*, 23 S. C. 370].

(a) [By the New York Code "the defendant may demur to the complaint, where one or more of the following objections appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.

104 PLEAS PUIS DARREIN CONTINUANCE.

D. PLEA PUIS DARREIN CONTINUANCE.—This is the name of the plea by which the defendant brings to the notice of the court matter of defense that has arisen since the last continuance. In it may be shown matter in bar of the action or in abatement, and it is not, therefore, a separate division

8. That the complaint does not state facts sufficient to constitute a cause of action. N. Y. C. C. P., § 488.

The same cause of action cannot be both demurred and answered unto in the same pleading. A clause in a pleading "that a complaint does not state facts sufficient to constitute a cause of action," states a ground of demurrer, but may be a demurrer or not according to the connection in which it is used. When appearing with denials, and with affirmative defenses, it is no more than a notice that at the trial defendant will move for a dismissal of the complaint upon that ground. *Barnard v. Morrison*, 29 Hun, 410].

The name demurrers, as used in the Code, [487 *et seq.*] covers the grounds for all *dilatory pleas*,—apparently. I say apparently, because of the wording of the section; which is,—“the defendant may demur to the complaint when it shall *appear on the face* thereof, either that the court has no jurisdiction” etc. So that, where one of the proper causes for a dilatory plea does *not* appear on the face of the complaint;—though it *exist in the case*, it is not cause for demurrer; but must be set up in an answer.

As it is *possible* that some of the causes, (formerly, of *abatement*,) should *appear on the face* of the complaint; and as a demurrer is the *only* pleading (to the complaint,) allowed by the Code, except an answer; it would seem necessary to make the demurrer reach matters of *abatement*, as well as fulfill its real, and proper office. Still, it would be a peculiar case, in which it would appear on the face of the complaint, that the court has no jurisdiction of the person of the defendant;—or that the plaintiff, as being an infant or married woman, has not legal capacity to sue, (31 Barb. 132;) or, that there is another action pending etc., for the same cause; or, (as in most cases,) that there is a non-joinder of parties. A plaintiff would hardly *intend* to put, in his complaint, allegations, which, as showing such defenses, must defeat him. And the experience of courts, and of the profession is, that to enable a defendant to reach *these* defenses, he is driven to *allege*, himself, the *facts* on which they arise: which allegations, under any *system* of pleading, are to be *in his plea*,—always concluding with a *verification*, and always open to *denial* from the plaintiff.

But a *misjoinder* of causes of action does appear, on the face of the complaint: and, of course, the *legal sufficiency* of the facts

of pleas. It is mentioned here to preserve the symmetry of the description, and will be more particularly described hereafter.

V. AMENDMENTS.—Having now followed the pleadings through their regular course it is necessary to suppose a variation in the proceedings at some stage in order that an

alleged, to authorize a judgment, is to be decided from the complaint itself. And these grounds, (the last two of the section,) are the only ones, of all there named, which under any legal system can, (ordinarily,) be reached by a *demurrer*, properly so called. Any available statement of either of the other grounds is properly a *pleading*, in its technical sense; and thus *contradicts* the very meaning of the word 'demur;'—which is to *rest*,—or *pause*; and thus *not to plead* to the declaration, (or complaint as now called,) because, from the *inherent insufficiency* of the pleading demurred to, the court *has nothing to proceed upon*; and thus there is a *legal reason why no plea*,—or *answer*,—is required. Under any legal rules known *before* the Code was, the section is *felo de se*.

If it be *necessary* to abrogate pleas to the jurisdiction, and all pleas in abatement; these first four causes for demurrer should be classed with answers. The fifth is properly ground for demurrer: Still, under the Code, as at common law, *no recovery* can be had on such a complaint. The plaintiff must *elect* which cause of action to proceed with, and *abandon* the others; or get leave to *amend* by striking out the rest: Or, there seems to be no reason, why a *motion in arrest of judgment* could not (under the Code,) be made. (See 8 How. Pr. Rep. 159. 3 Seld. 168. 2 Kern. 561.) Nor does there seem any way to avoid it, and amend, even after verdict, under sections [723, 724] of the Code; as they seem not to reach the case. And this conclusion can hardly be altered by section [499] of the Code; since the difficulty is so essentially, and inherently, of *substance*, that no waiver can reach it. 15 N. Y. Rep. 425, 431.

It should, further, be observed, that in here speaking of misjoinder; the reference is to a *properly separated statement* of two distinct causes of action, which, from their natures cannot be joined in one complaint: and that no reference is here had to the *mixing up* (in *one count*,) of *two* causes of action;—although this latter fault, (constituting *duplicit*y,) is still held a ground for demurrer. (8 How. Pr. Rep. 177. 9 Ib. 198. 311. 342. 10 Ib. 361.) And, as the Code has named *no such ground* for a demurrer, courts are *compelled* to call it a demurrer for '*improperly uniting causes of action*.' (See *infra*, *DUPPLICITY*.)

explanation may be given of a step which is at this day, as it always has been, of very frequent occurrence in actions at law.

If then, at any time during the progress of the pleadings, or on the trial a party finds that he has made a defective or mistaken statement of his claim or defense, he should apply immediately for leave to amend.

In the times when pleadings were oral, the pleaders could correct their statements, of course, from time to time, during the progress of the altercations, as the exigency of the situation required. After the practice of pleading in writing was adopted the right to amend, already fixed, was continued subject to certain regulations as to costs, etc., which freed the process of any taint of unfairness to the opposite party.

It was a rule strictly enforced in the early times of the common law that no alterations should be allowed after the record was once made up. Thus later it came to be the rule that amendments were allowable only up to the time of signing judgment. But by statutes passed at various times courts were empowered to allow amendments in their discretion after judgment was signed. In the use of this discretion courts exercised a growing liberality, which, in the course of time almost required restriction itself. (b)

VI. THE TRANSCRIPT.*—The pleadings having come to an end, the next step at common law, is to collect together the pleadings and entries upon the record into a complete transcript. In case of an issue of law this was called the demurrer book; in case of an issue of fact, the paper-book. If the issue is one of law the case is set for argument before the

(b) See 3 Black. Com. 497, *et seq.*; *Rush v. Seymour*, 10 Mod. 88; *Johnson v. Robinson Consolidated Min. Co.*, (Col.) 5 L. R. A. 769, and note, and *infra*, AMENDMENTS.

* 2 Tidd, Pr. 718, 1157; *Andrews' Stephen*, 166; *infra* ISSUE.

court, questions of law being for the decision of the judge alone. If the issue be one of fact it is set for trial. (c)

VII.—THE TRIAL.—At least seven methods of trial were known to the common law, of which the only method to which we need refer at this place is the trial by jury. (d)

The issue of fact being made up a writ of *venire facias* issued from the superior court commanding the sheriff that he cause twelve free men to come, on a day named, in to the court issuing the writ. This writ the sheriff returned with the names of the jurors on a panel annexed thereto; but the jurors were not thus far summoned. For this purpose a writ issued to compel the attendance of the jurors on a day named, in the trial court, and this writ was called a *habeas corpora* or *distringas* according to the court from which it issued. (e)

Now, the day having arrived, and the record having been produced in court, and the jurors having been examined and selected, the case was stated and the issue explained by the court, or by counsel under the supervision of the court. The next step is the testimony of the witnesses, which is followed in regular order by the summing up or addresses of counsel, the charge of the court, the deliberation by the jury and the verdict.

(c) Strictly speaking, and in the sense of the common law, the trial does not commence until there is an issue of fact. *Mech. Sav. Bank v. Harding*, 65 Kan. 655; *Deane v. Bridge Co.*, 22 Oreg. 167.

(d) Further, as to methods of trial, see *infra*, GENERAL ISSUE. "By the common law, at the date of the adoption of the constitution, the trial of all issues of fact must be by a jury. * * * A jury trial in issues of fact was the right of the litigant." Shipman, J., in *Raymond v. Dandury & Norwalk R. R. Co.*, 43 Conn. 596.

It is to be borne in mind, however, that some of the supposedly obsolete forms of trial—for example, trial by wager of battle—were not abolished in England until toward the close of the reign of George III, and after the proceedings in a famous case had attracted public attention.

(e) 3 Black. Com. 354; 2 Tidd, Pr. 777.

TRIAL AT BAR.—Technically a trial by the judges of the Superior Court without a jury in difficult cases was called a trial at bar by way of distinction from a trial by jury, which was termed a trial at *nisi prius*. A trial of issues of fact by the court is common at this day, and there is generally some relaxation in the rules regarding the reception of evidence. (f)

DEMURRER TO EVIDENCE.—If no exceptions are taken in the manner to be explained hereafter, to the rulings on questions of law, or if the judge does not make any rulings, a party who feels aggrieved may dispute the legal effect of the evidence by demurring to the evidence or by obtaining a special verdict. At this day the demurrer to evidence has given place, in many jurisdictions to a motion for a direction of verdict, in others to a motion for a nonsuit or some analogous proceeding. These courses need only to be mentioned here as they are more particularly described hereafter. (g)

THE VERDICT, GENERAL AND SPECIAL.—The verdict, after being drawn up in a formal manner, was entered upon the back of the record, and was called the *postea*.

A *general verdict* is one found generally—"for the plaintiff" or "for the defendant." Such a verdict is proper if it will settle the rights and obligations of the parties. (h)

SPECIAL VERDICT.—If a party does not wish to demur to the evidence, (a proceeding explained hereafter), he may have the legal effect of the evidence determined by procuring the jury to return a special verdict. This is a verdict finding the facts deemed by the jury to be established by the evidence, and leaving the application of the law to the court, because,

(f) See *Abraham v. Levy*, 72 Fed. 124; *Mofft v. Hereford*, 132 Mo. 513; *Willard v. Foster*, 24 Neb. 205; *Wright v. Rambo*, 21 Grat. 153.

(g) See *infra*, DEMURRER TO EVIDENCE and SPECIAL VERDICT.

(h) 3 Black. Com. 377, *et seq.*; *Johnson v. Higgins*, 53 Conn. 236; *Denny v. Booker*, 2 Bibb. 427. See, *Porter v. West. etc. R. Co.*, 97 N. C. 66.

according to the formula, the jury "are ignorant, in point of law, on which side they ought, upon these facts, to find the issue."

It is in the option of the jury to find a general or a special verdict unless, as is frequently provided for by statute, they have directions from the court. *(i)*

It is also within the discretion of the court whether or not it will require the jury to return a special verdict. *(j)*

VIII.—NEW TRIAL AND VENIRE FACIAS DE NOVO.—After the verdict is returned a party who feels himself aggrieved may request the court by motion to grant him a new trial or a *venire facias de novo*. These methods of relief resemble each other sufficiently to be frequently confused, and yet they are essentially different.

A *new trial* is a re-examination of the issue of fact, in the same court but before another jury.

At common law a motion for a new trial was addressed to the discretion of the court, and could be based, among other things, on the ground that,

- 1, the judge had misdirected the jury; or,
- 2, the judge had violated a rule of law in admitting or refusing to admit, evidence; or,
- 3, the verdict was contrary to the evidence; or,
- 4, the evidence was insufficient in law to sustain the verdict; or,
- 5, a new and material fact had come to light since the verdict; or,
- 6, the jury had been guilty of improper conduct. *(k)*

(i) *Ruffing v. Tilton*, 12 Ind. 259; *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325; *Hendrickson v. Walker*, 32 Mich. 68.

(j) *Olmstead v. Dauphiny*, 104 Cal. 635; *Toledo, etc., Ry. Co. v. Mazfeld*, 72 Ill. 95; *Farr v. Thompson*, 1 Speers. (S. C.) 93; *McGrath v. The Village of Bloomer*, 73 Wis. 29.

(k) See 3 Black. Com. 391 *et seq.*; *Horn v. Queen*, 4 Neb. 108.

In *Zaleski v. Clark*, 45 Conn. 397, 401, Judge Loomis said: "The term 'new trial' has been a familiar one to the profession in this

Generally, at this day, the grounds on which a motion for a new trial may be made are prescribed, and the whole procedure regulated, by statute. These statutes are not generally regarded as being exclusive, the power to grant a new trial being inherent in the court.⁽¹⁾

Venire Facias de Novo.—As has been pointed out in speaking of a motion for a new trial, the object of moving for

state since our early colonial history, and had acquired a settled meaning in England before our ancestors came to this country.

* * * Previous to the year 1762 they were granted only by the General Assembly, upon petition of the aggrieved party. In that year a statute was passed giving to the Supervisor and County Courts power to grant new trials in cases tried before them. * * * In 1807, after the re-organization of the courts by the act of the previous year, and the establishment upon a new basis of the Supreme Court of Errors, which was now to consist of the nine judges of the Superior Court, the judges, under a statute authorizing them to establish rules of practice, adopted a rule that bills of exceptions should not thereafter be admitted, but that motions for new trials should be admitted in all cases in their place."

(1) *Donnelly v. McArdle*, 14 App. Div. 217.

In *Witham v. Earl of Derby*, 1 Wils. 48, 55, Lord Chief Justice Willes pointed out that a *venire facias de novo* and a motion for a new trial differed in many things, though they are alike in that a *venire facias de novo* must be awarded in both, and that the court may or may not grant either of them. "But they differ first in this, that a *ve. fa. de novo* is the ancient proceeding of the common law, a new trial is only a new invention; the first is as ancient as the law when attaints were in use, but motions for new trials were introduced in this manner: the judgment in attaint was very severe, and the punishment excessively hard, and therefore to avoid that severity it was thought better to proceed in a milder way, and so motions for new trials were introduced. They likewise differ in this respect, that new trials are generally granted where a general verdict is found, a *ve. fa. de novo* upon a special verdict; but the most material difference between them is this, that a *ve. fa. de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it; * * * a *ve. fa. de novo* can only be granted in one or other of these two cases; as first, if it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it; secondly, where it appears that the jury ought to have found other facts differently."

a *venire facias-de novo* is also to procure a new trial. But this motion must be based on some irregularity in the proceedings as shown by the record. The motion will not be granted unless the verdict is so uncertain or defective that a judgment or finding cannot be rendered thereon, *(m)* as where the verdict fails to assess the damages, *(n)* or is inconsistent and repugnant, *(o)* or, if intended for a special verdict, is incomplete as such. *(p)*

IX.—BILL OF EXCEPTIONS.—In the early stages of the common law, when the pleadings were oral, the judge acted as moderator and regulated the altercations of the parties. So to this day the whole trial proceeds under the supervision of the judge to whom must be referred, from time to time as they arise, questions of law relating to the admissibility of evidence or other matters. If a party is not satisfied with the rulings thus rendered by the court on questions of law submitted to him, he may wish to obtain a review of such rulings by a court of superior jurisdiction. For this purpose it becomes necessary to put the questions of law on record for the information of the latter court. He may do this by taking an exception to each ruling of the trial judge, and by ultimately embodying such rulings in a written statement, called a bill of exceptions, which, if a true statement, the trial judge will sign on request. By this means these questions of law are made a part of the record, and are thus reviewed by the higher court before whom the record is taken subsequently by a writ of error.

(m) *Indianapolis St. Ry. Co. v. Taylor*, (Ind.) 80 N. E. 436; *Knight v. Knight*, 6 Ind. App. 268; *Bellows v. Hollowell, etc., Bank*, 2 Mason 31.

(n) *Ferris v. Odell*, 139 Ind. 579; *Hershman v. Hershman*, 63 Ind. 451.

(o) *Potter v. Hiscox*, 30 Conn. 508.

(p) *Watson v. Delafield*, 1 Johns. 150; *Suydam v. Williamson*, 20 How. 427; *Barnes v. Williams*, 11 Wheat. 415.

For the review of an error that appears on the record no bill of exceptions is necessary. (q)

X.—JUDGMENT was formerly pronounced in open court, but later this formality was dispensed with, and it was necessary only that the party entitled to judgment should procure the signature of the proper officer of the court certifying to the fact of the judgment. This was signing the judgment. Entering the judgment was, in case of an issue of fact, making up the whole proceedings from the beginning on a roll of parchment. And if the issue had been an issue of law the record was now made up for the first time, including the judgment. This was the origin of the term judgment roll. (r)

XI.—WRIT OF ERROR.—After final judgment is entered, the unsuccessful party may bring a writ of error; and this, if obtained and allowed, and if notice of the allowance be served

(q) 3 Black. Com. *Money v. Leach*, 3 Burr. 1692. And see, *Bowen v. State*, 108 Ind. 411; *Cox v. Field*, 13 N. J. L. 215; *Berly v. Taylor*, 5 Hill, 577; *Coughlin v. District of Columbia*, 106 U. S. 7; *Generes v. Campbell*, 11 Wall. 193; *Ex Parte Crane*, 5 Pet. 190; *State v. Hope*, (Mo.) 8 L. R. A. and note.

This practice was first adopted in England by the statute of Westminster 2 (13 Edw. I, ch. 31), "to cure the great evil which before existed of the unlimited power of the judges to cause just such record to be made of the proceedings in a cause *ore tenus* as they saw fit, and of the very natural disposition of the judges, and the frequency of its apparent exercise, to suppress such rulings and opinions of the law as they preferred to be final with themselves, rather than submit them to the revision and reversal of a higher court. * * * Great formality and certainty were necessary. * * * In this country the bill of exceptions is regulated by statute and rules, equal in particularity with the English statute in all matters of substance, and requires as much, if not more, time and care in its preparation, by notice, amendment, settling, and signing, and its office is the same as being made a part of the record, which may go to the court of errors by writ of error after judgment." Orton, J., in *State v. Clifford*, 58 Wis. 113, 116-117.

(r) For explanation of MOTION IN ARREST OF JUDGMENT, MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO, and REPLEADER, See *infra*.

before execution, suspends, generally speaking, the latter proceeding, till the former is determined.(s)

A writ of error is a writ issuing from an appellate court directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ—called a writ of error *coram nobis*, or *vobis*(t)—is where the alleged error consists of matter of *fact*; the second—called a writ of error generally—where it consists of matter of *law*.

When a writ of error is obtained, the whole proceedings, to final judgment inclusive, are subject to revision by the appellate court; and the object of the writ of error is to reverse the judgment, for some *error of fact or law* that is supposed to exist in the *record*. It will be proper here to explain in what such error may consist.

It is an invariable rule, and one which is founded on the very best principles, that a party, after a trial and a verdict, and a judgment thereon, is entirely precluded from raising, by a proceeding in error, any question of fact, unless there has been some error in fact in the conduct of the cause which had not been put in issue by the pleadings, and which can be alleged without being inconsistent with the record. It is within these limits alone that any question of error in fact can be brought after trial, verdict, and judgment.(u)

(s) At common law a writ of error, though duly allowed and served, does not operate as a *supersedeas*, so far as to supersede a levy of execution which had been begun before the allowance of the writ of error. *Boyle v. Zacharie*, 6 Peters, 659; *Blanchard v. Myers*, 9 Johns. 66; *Bryan v. Bates*, 12 Allen, 207; *Kendall v. Wilkinson*, 4 E. & B. 688.

(t) As to these terms see 2 Tidd, 8th ed. 1191; *United States v. Plumer*, 3 Cliff. 58, 59.

(u) *Irwin v. Grey*, L. R. 2 H. L. 24.

Where an *issue in fact* has been decided, there is no appeal from its decision except in the way of motion for new trial; and its being wrongly decided is not *error* in the technical sense of that term. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to *error* in the proceedings. For example, if the defendant has a release, but does not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward.(v)

The general rule of law is clear that no matters which could have been set up by plea in bar or abatement can be set up after judgment by way of error. The plaintiff in error "shall not assign that for error which he might have pleaded in abatement or in bar of the action, as a release or the like, or which was cured by the appearance of the party below.(w)

And it is laid down as a general rule that nothing can be assigned for error that contradicts the record, or that is aided by appearance, or that is not taken advantage of in due time.(x)

But there are certain facts which affect the *validity and regularity of the legal proceeding itself*; such as the defendant's having, while *under age*, appeared in the suit by *attorney*, and not by *guardian*;(y) or the plaintiff or defendant having been a *married woman* when the suit was commenced.(z)

(v) Stephen Pl. 2d. ed. 152.

(w) 2 Wms. Saund. 6th ed. 101 w, 101 x; 2 Wms. Notes to Saund. 327.

(x) Judgment of Willes, J., in *Metropolitan Ry. Co. v. Wilson*, L. R. 6 C. P. 381.

(y) *Castledine v. Mundy*, 4 B. & Ad. 90; 1 N. & M. 635; *Marshall v. Jackson*, 4 E. & B. 669, note.

(z) *King v. Jones*, 2 Ld. Raym. 1525; *Dick v. Tolhausen*, 4 H. & N. 695; Montague Smith, J., in *Metropolitan Ry. Co. v. Wilson*, 40 L. J. C. P. 212.

Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to reverse the judgment upon writ of error. In all such cases, the proceedings in error are properly taken in the court in which the original judgment was pronounced, and the writ of error *coram nobis* applies, "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment." (a)

These rules are well illustrated by a recent case. A judgment having been recovered by plaintiffs, suing as husband and wife, the defendants afterward brought error in fact, assigning as error that, before the pretended marriage of the plaintiffs, the female plaintiff had intermarried with another man, who still remained alive. It was *held*, that such assignment of error was bad, inasmuch as the facts composing it might have been pleaded, and the defendants were, therefore, not entitled to take advantage of them by way of error. (b)

Error *in fact* cannot be brought before any court except that in which the trial and proceedings have originally been conducted. It is quite clear that you cannot have an allegation of error in fact in any other court except that in which the cause is depending, and for this reason; if error in fact is alleged by one party, the other is entitled to dispute the allegation. Lord Chief Baron Pollock gave this illustration of the distinction: "If the error assigned below was, that an infant had appeared by attorney, which would be error in fact, and the court below decided that it was not error, that which was error in fact in the court below would, by that erroneous decision, become error in law, because the record would be wrong." (c)

(a) 2 Tidd, 9th ed. 1136.

(b) *Metropolitan Ry. Co. v. Wilson*, L. R. 6 C. P. 376.

(c) *Irwin v. Grey*, L. R. 1 C. P. 173, quoted by Lord Chelmsford in the same case in the House of Lords, L. R. 2 H. L. 23.

If the court in which the cause originated decided wrongly upon an error in fact, so that the decision was erroneous in point of law, and so appeared on the record it might be brought before a court of error, but not otherwise. (d)

In this class of cases the courts act on their own discretion; and if no injustice has been done, or the party has acquiesced in it, they will not interfere. The course of proceeding in such cases is well illustrated by a recent case in the House of Lords. (e)

It was there determined that it is no ground of error, either in fact or in law, that all the special jurors whose names are on the panel to try the cause have not been summoned to attend. Nor is it ground of error that the jury panel was called over before ten o'clock in the morning, the hour appointed for the sitting of the court, and that ten special jurors only having appeared, the jury was made up with two talesmen. These are irregularities for the court to set right on motion, if any injustice has been suffered from their occurrence.

It was pointed out in the judgment in *Irwin v. Grey*, (f) that it was better not to extend the number of cases in which matters might be assigned as errors in fact, but to leave such matters, as much as possible, to be dealt with by the court in the exercise of its summary jurisdiction, to prevent abuse of its process, inasmuch as by the former mode of proceeding the court is bound by a rigid rule of law to reverse the judgment if there be error, even although it may be doing injustice by so doing.

But the most frequent case of error is when, upon the face of the record, there appears to have been committed

(d) *Irwin v. Grey*, L. R. 2 H. L. 26, 27.

(e) *Irwin v. Grey*, L. R. 2 H. L. 20. See, also, *Curtis v. March*, 3 H. & N. 866.

(f) 19 C. B. N. S. 585; L. R. 1 C. P. 171; L. R. 2 H. L. 20; Willes, J., in *Metropolitan Ry. Co. v. Wilson*, L. R. 6 C. P. 381; 40 L. J. C. P. 211.

a mistake *in law*. This may be by the judges having wrongly decided an issue in law brought before them by demurrer; but may also happen in other ways. The judgment, will, in general, follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of proceedings in error, that the judges are, in contemplation of law, bound, before in any case they give judgment, *to examine the whole record*; and then to adjudge either for the plaintiff or defendant, according to the legal right, as it may on the whole appear,—notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may from misapprehension have passed by a material question of law, without taking issue upon it. Therefore, whenever *upon examination of the whole record*, right appears, on the whole, not to have been done, and judgment appears to have been given for one of the parties, when it should have been given for the other, this will be *error in law*.(g)

And it will be equally error, whether the question was raised on *demurrer*,—or the issue was an issue in *fact*,—or there was *no issue*; judgment having been taken by default, confession, etc. So, on the same principle, there will be error in law, if *judgment has been entered in a wrong form* inappropriate to the case.(h)

But, on the other hand, nothing will be error in law that does not appear *on the face of the record*; for matters not so appearing are not supposed to have entered into the consideration of the judges.(i)

Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment); but by a writ of

(g) *Bruce v. Wait*, 1 M. & G. 1; 1 Scott N. R. 81.

(h) *Stephen Pl.* 2d ed. 153, 154.

(i) 2 Inst. 426.

error, requiring the record to be sent into the court of appellate jurisdiction, that the error may be there corrected,—and called a writ of error generally. (j)

With respect to the writ of error of this latter description, it is to be observed that it cannot be supported, unless the error in law be of a *substantial kind*. For as by the effect of the statutes of amendments and jeofails, errors of *mere form* are no ground for arresting the judgment, so, by the effect of the same statutes, such objections are now insufficient to found a writ of error, though at common law the case was otherwise. (k)

The plea *in nullo est erratum* is in the nature of a demurrer and puts in issue the validity of the judgment in all matters of law. This plea “in fact amounts to a demurrer; in other words that, even admitting the facts stated in the allegation of errors to be true, there is no error on the record.” (l)

But “*in nullo est erratum* is no admission of the fact assigned for error, unless it could be lawfully assigned and is well assigned, in point of form.” (m)

(j) Stephen Pl. 2d ed. 154.

(k) Stephen Pl. 2d ed. 155.

(l) *Irwin v. Grey*, L. R. 2 H. L. 23.

(m) *Rex v. Carlile*, 2 B. & Ad. 362.

CHAPTER II.

PLEAS PUIS DARREIN CONTINUANCE.

DEFENDANT HAS ONE PLEA OF A KIND.—As the defendant is allowed, by the common law, to plead only *one* plea, of any one kind or class; so also, after having pleaded, within the time allowed for that purpose, any one matter of defence, he cannot, in general, and as a matter of right, retract and substitute another. (a)

If it were otherwise, the defendant might protract the proceedings interminably, by repeatedly shifting his ground of defence.

MATTER NEWLY ARISING TO BE PLEADED HOW?—But to this general rule there is an exception, when *new* matter of defence arises, *after* he has once pleaded, and after the last *continuance* (or adjournment) of the cause. (b)

For it would be unreasonable to preclude him from pleading matter thus arising, and which it was not in his power to plead in the first instance. The new plea, which this exception to the general rule allows, is called a plea *puis darrein continuance*—*since (or after) the last continuance*.—It is here to be observed, that during the whole proceedings in a suit, from the time of the defendant's appearance, until its final determination, the cause is to be *continued*, (or as it is sometimes expressed, the *parties* must be "continued" in

(a) Lawes' Pl. 173; Bac. Abr. *Pleas*, etc. Q.; 1 Chitt. Pl. 635; Doct. Pl. 297.

(b) Id. 3 Black. Com. 316, 317; Gilb. H. C. P. 105; *Rundle v. Little*, 6 Q. B. 174. [*Lindsay v. Barnett*, 130 Ala. 417; *Mount v. Scholes*, 120 Ill. 394; *Yeaton v. Linn*, 5 Pet. 224; *Thompson v. U. S.*, 103 U. S. 480].

court), from day to day, or from time to time, by regular entries, to be made for that purpose. And when any new matter of defence arises, *between* two of these continuances or adjournments, it may be pleaded *puis darrein continuance*, *before* the next continuance, notwithstanding the pendency of a prior plea.(c)

(c) *Id.* In many states the actual *continuance* of a cause, from one term to another; or from one particular day in term to another; is practically done away with. And the *times* for pleading are fixed without any reference to terms of court; and depend upon statutes, or rules of court. Still, the right of a party to change his plea, so as to avail himself of facts occurring during the course of the litigation, remains unimpaired. The words, *puis darrein continuance*, in effect mean a pleading of facts occurring *since the last stage of the suit*;—whatever that stage may be, provided it *precede the trial*.

Such a plea is a matter of right (*Todd v. Emly*, 9 M. & W. 606), and is a waiver of previous pleas (*Dunn v. Hill*, 11 M. & W. 470; *Wagner v. Imbrie*, 6 Exch. 380; *Wallace v. McConnell*, 13 Peters 142, 152; *Kimball v. Huntington*, 10 Wend. 679; *Whittemore v. Stephens*, 48 Mich. 573); and so, if pleaded after a demurrer, is a retraxit of the demurrer (*Solomon v. Graham*, 3 E. & B. 309).

[AN ACTION ON THE CASE is said to be an exception on account of the equitable character of the action, and any matter of defense, whenever arising may be proved, in such an action, under the general issue. *City of Chicago v. Babcock*, 143 Ill. 358, following *Bird v. Randall*, 3 Burr. 1345.

At common law the filing of this plea eliminated all other defense. So other pleas might be stricken. *Harding v. Horton*, 79 Ill. App. 123. So, generally, now, in contemplation of law, when such a plea is filed all previous defenses are stricken from the record, and everything is confessed except the matter contested by this plea. And if on demurrer decision is against the defendant judgment is peremptory in favor of the plaintiff. *Mount v. Scholes*, 120 Ill. 394; *Donley v. Dougherty*, 97 Ill. App. 544; *Hilliker v. Simpson*, 92 Me. 590; *True v. Huntoon*, 54 N. H. 121; *Probate Court v. Potter*, 25 R. I. 204. Under a rule of court in Michigan such a plea stands simply as a notice under the general issue, and on failure to establish the defense set up the defendant may revert to other defenses which he might have interposed under the issue as it existed before this plea was filed. *People v. Plank-Road Co.*, 125 Mich. 366. And an early statute in Alabama declared that the filing of this plea should not constitute a waiver. *Lacy v. Rockett*, 11 Ala. 1002.

In *Smith v. Carroll*, 17 R. I. 125, the defendants pleaded that after

PLEAS OF THIS KIND MAY BE EITHER IN ABATEMENT OR IN BAR; and may be pleaded, even after an issue joined, either in fact or in law, if the new matter has arisen *after* the issue was joined, and is pleaded *before* the next adjournment. (*d*)

Thus, if the plaintiff, being a feme sole, has married since the last continuance; her marriage may be pleaded, before the next continuance, to her disability, although the *regular* time for pleading such a plea has elapsed. (*e*)

continuance they had been served as garnishees in an action brought against the plaintiff, the purpose of the plea being to protect the defendant from liability to double payment. The court said, by Durfee, C. J., that the plea had "the effect simply of a motion for a continuance, or for a temporary stay of proceedings; and when the two suits are depending in the same court, the record in each being thus readily accessible to inspection, we see no reason why the result, intended to be accomplished by the plea, cannot be as well, if not better, accomplished by motion. It seems to be the practice in some states to react to a motion rather than a plea. *Winthrop v. Carlton*, 8 Mass. 456; and see *Spicer v. Spicer*, 23 Vt. 678. And in this view it seems to us that the matter, whether interposed by plea or motion, need not be very strictly regarded, if only it be made to appear that justice requires a stay."]

(*d*) Com. Dig. *Abatement*, I. 24; 1 Chitt. Pl. 637; 3 Black. Com. 316, 5 Peters, 232; 1 Allen, 214; [*Yeaton v. Linn*, 5 Pet. 224; *Rowell v. Hayden*, 40 Me. 585. And see further, in illustration, *Leavitt v. School District*, 78 Me. 574 (change in title); *Moore v. Austin*, 85 N. C. 179 (award); *Keene v. Mould*, 16 Ohio 12 (discharge in bankruptcy); *Smith v. Carroll*, 17 R. I. 125 (attachment); *Thompson v. U. S.*, 103 U. S. 480 (successor in office)].

(*e*) [See *Wilson v. Hamilton*, 4 S. & R. 230].

A cause for abatement may exist at an early stage of an action and cease to exist at a later stage. When the cause no longer exists, the action cannot be abated on the ground that it once existed. Thus, if a *feme sole* marry after bringing an action, and becomes a widow before the defendant pleads the marriage in abatement, the action is not abated nor abatable. On this principle it has been decided that an insolvent debtor, who has commenced a real action before his insolvency, and afterward purchased the land from his assignee, and taken a deed thereof, may prosecute the same to final judgment in his own name, if no plea in abatement has been interposed. *Gerrish v. Garry*, 1 Allen 253.

So also, if the plaintiff has, since the last continuance, *released* the right of action; (f) the defendant may, in the same manner, plead the release in bar, although he has previously pleaded, and issue has been joined upon a different matter of defence. But if he suffers another continuance to intervene, before he pleads such new matter; he *waives* it, and cannot afterwards plead it. (g)

Nor can he plead any such plea, after a demurrer determined, or verdict found—all pleading in the cause being then at an end. (h)

(f) [*Ryan v. B. & O. R. R. Co.*, 60 Ill. App. 612. And the particulars should be alleged. *Field v. Cappers*, 81 Me. 36].

(g) *Id.*; *Bac. Abr. Pleas*, etc. Q., *Lawes' Pl.* 174; [*Wilson v. Hamilton*, 4 S. & R. 239. After a continuance has intervened whether the plea shall be accepted or not is in the discretion of the court. *Rowell v. Hayden*, 40 Me. 582. In *Harding v. Minear*, 54 Cal. 502, 505-506, the court considered the history of this plea and said: "But the plea had to be allowed by the court. It was in the breast of the judge at *Nisi Prius* whether he would accept it or not; therefore it was necessary for the party to make it appear to the judge that it was a true plea. * * * That practice was followed in the common law courts until the time of the Codes. Say the court in *Morgan v. Dwyer*, 10 Johns.: 'It rests in the discretion of the court to receive such a plea or not, even after more than one continuance between the time that the matter of the plea arose and the coming in of the plea; and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea.'"] The exercise of the discretion is never matter of exception, (*Curry v. Smith*, 50 Me.); and will not be reviewed by the appellate court unless in a case of clear abuse, (*Souvais v. Leavitt*, 53 Mich. 577, when two months had elapsed and the parties had prepared for trial on the issue as it stood).

If such a plea is filed out of time advantage is taken by a motion to set it aside. *Rowell v. Hayden*, 40 Me. 582.

In Illinois this plea may be filed at any time before trial. *City of East St. Louis v. Renshaw*, 153 Ill. 491.

(h) 3 Black. Com. 317. [As to demurrer, see *Shirley v. Shattuck*, 13 Met. (Mass.) 256.

That such a plea comes too late after verdict, see *Staples v. Wellington*, 62 Me. 9. So after a finding by the court which is equivalent to a verdict. *Tweedy v. Bennett*, 31 Conn. 276. Much more is it

ONE PLEA OF A KIND PUIS DARREIN.—It is said that there can be but *one* plea *puis darrein continuance*, in one and the same cause, lest the proceedings should be protracted *in infinitum*, or beyond any assignable limit. (i)

But matter of *abatement* may be pleaded, *puis darrein continuance*, though the defendant has previously pleaded in bar. (j)

For a plea in bar waives only such matters of abatement, *as existed at the time* of pleading in bar.

A PLEA OF THIS KIND IN ABATEMENT, begins and concludes like a plea of the same kind, when pleaded in the first instance; but when pleaded *in bar*, it begins with saying that the plaintiff ought not *further* to maintain his action; and concludes by praying judgment, if the plaintiff ought *further* to maintain his action. (k)

In other respects, pleas of this kind are governed by the same rules, which regulate other pleas in general. (l)

too late after appeal taken. *Voorhees v. Indianapolis Car & Man. Co.*, 140 Ind. 220].

(i) Lawes' Pl. 174; Gilb. H. C. P. 105; 1 Chitt. Pl. 638; [*City of East St. Louis v. Renshaw*, 153 Ill. 491.]

(j) Gilb. H. C. P. 105; Andr. 328; 2 Stra. 1106; 1 Chitt. Pl. 636; 14 Mass. 295.

(k) Lawes' Pl. 174-5; Bull. N. P. 310; Cro. Eliz. 49; 5 Peters, 231-2; 1 Chitt. Pl. 637; *Vid.* 3 N. H. 102. [For an example of an imperfect plea, see, *Gibson v. Bourland*, 13 Ill. App. 352.

The beginning and conclusion of the plea are not to be regarded under the reformed procedure, the nature of the plea being determined by its substance. *State v. Webb*, 110 Ala. 215, 231. But under the common law rules extreme certainty is required in framing such a plea. *Gibson v. Bourland*, 13 Ill. App. 352 (where it was held that the day of continuance, and the time and plea of the defense must be shown); *Augusta v. Moulton*, 75 Me. 551; *Hilliker v. Simpson*, 92 Me. 590 (which see for a form); *Jewett v. Jewett*, 58 Me. 234 and authorities cited].

(l) [As, for example, if it purports to answer the whole declaration and answers only a part thereof it is bad on demurrer. *Harding v. Horton*, 79 Ill. App. 123; *Augusta v. Moulton*, 75 Me. 551, 556.

CHAPTER III.

AMENDMENTS.

THE POWER TO AMEND IS INHERENT IN THE COURT.—
The power to allow amendments is incidental to the exercise

For a judicial discussion of the rules governing these pleas, see, *Waterbury v. McMillan*, 46 Miss. 635].

SUPPLEMENTAL PLEADINGS UNDER THE CODES.—The rights of parties, to new, or *newly discovered*, matters;—i. e. matters *arising* during the pendency of the suit,—or then discovered to have before arisen; are considerably extended by the Code. [N. Y. C. C. P. § 544 : Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, * * * The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading.

This section provides a substitute for the former practice, in actions at law of a plea *puis darrein continuance*, and in actions in equity of a supplemental *answer* (*Allen v. City of Davenport*, 116 Ia. 20), with the distinction that the supplemental answer under the code does not take the place of the original answer as does an amended answer, but is in addition to it (*Holyoke v. Adams*, 59 N. Y. 233), and is not a waiver of defenses before interposed (*Medbury v. Swan*, 46 N. Y. 200)]. The motion, for leave so to plead, need not be made at the *earliest possible day*; but should be, without *improper delay*. 4 How. Pr. Rep. 251. 8 Ib. 56. 9 Ib. 568. 15 Ib. 345, 399. See 1 Wend. Rep. 89.

[A supplemental complaint cannot supply a cause of action wanting in the original complaint (*Myer v. Belandi*, 39 Minn. 438), but must be in aid of the original (*Swedish Amer. Nat. Bk. v. Dickinson Co.*, 6 N. Dak. 222), and cannot set up a new cause of action, as, for example, a judgment since rendered in another state (*Id.*). It may set up new damages from a continuance of the wrongful facts.

of all judicial power. Being indispensable to the ends of justice it is inherent in the court.

TECHNICALITIES AND TRIFLING VARIANCES DISREGARDED.—In all jurisdictions in which our law is adminis-

Schmoe v. Catton, (Ind.) 79 N. E. 184. And see, *State v. Black Riv. Phosphate Co.*, 32 Fla. 82. And it has been held that a supplemental answer may be allowed after judgment as well as before, in the interest of justice. *State ex rel. v. District Court*, 91 Minn. 161, where the supplemental answer was allowed after the judgment had been revised on appeal and remanded without directions.

The right to file a supplemental answer is not an absolute and positive right, but is made to depend upon the leave of the court in the exercise of a legal discretion. Granting such leave in no way determines the right of the parties. *Silver & Co. v. Waterman*, 106 N. Y. Suppl. 899. Leave asked during the progress of the trial will be refused if no reason is shown why it was not asked before trial. *Estate of Fitzgerald v. Union Sav. Bank*, 65 Neb. 97. The application may be refused if the new defense be inequitable (*Harding v. Minear*, 54 Cal. 502; *Holyoke v. Adams*, 59 N. Y. 233); or on the ground of laches (*French v. Edwards*, 4 Sawy. 125); but the discretion is to be exercised reasonably and not capriciously or wilfully. *Spears v. Mayor*, etc., 72 N. Y. 442; *Copeland v. Copeland*, 60 S. C. 135. The court will not allow an injustice. *Holyoke v. Adams*, 59 N. Y. 233. Material averments carelessly omitted from the original pleading cannot be supplied in this way (*Medbury v. Swan*, 46 N. Y. 200), but matter of defense to the action arising or coming to the knowledge of the defendant, after the commencement of the action, as, for example, a judgment rendered in another action (*Jones v. Gould*, 107 N. Y. Suppl. 661; *Lytle v. Crawford*, 69 App. Div. 273), a release (*O'Brien v. Metropolitan St. R. Co.*, 27 App. Div. 1), a discharge in bankruptcy (*Barstow v. Hansen*, 2 Hun 333), a subsequent statute relieving defendant from liability (*People v. Ulster & D. R. Co.*, 8 N. Y. Suppl. 149), overpayment (*Howard v. Johnston*, 82 N. Y. 271), can be interposed only by leave of the court and in the form of a supplemental answer. *Galm v. Sullivan*, 117 App. Div. 235; *Bennett v. Lawrence*, 71 App. Div. 413. But such an answer cannot be used to excuse fault or mistake of the defendant. *Haffey v. Lynch*, 46 App. Div. 160. But the objection that leave of the court was not first obtained is waived by failing to object before trial and proceeding with the trial. *Cass v. Higginbotham*, 100 N. Y. 248. As to amendments a supplemental pleading is on the same footing as another. *Divine v. Duncan*, 52 How. Pr. 446.]

tered the tendency long has been to dispense with technical forms, and to require only enough to administer justice fully and fairly. If an objection is taken to a matter of form the court will generally allow an amendment as of course without a continuance. (a)

It is the policy of the law to try cases upon their merits, disregarding immaterial questions of form, and after a fair trial to conform the pleadings to the case made by the evidence. (b)

So the provision is quite general which declares in effect that "in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the parties." (c)

(a) Amendments, like other questions relating to pleadings, are governed by the law of the forum. *Fryklund v. Gt. Northern R. Co.*, (Minn.) 111 N. W. 727. See *Miller v. Blow*, 68 Ill. 304.

By § 542 N. Y. C. C. P., "within twenty days after a pleading or the answer, demurrer or reply thereto, is served or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had." There can be only one amendment under this section. The power is exhausted when the plaintiff amends to satisfy objections advanced by the defendant but without an order from the court. *Freyhan v. Wertheimer*, 52 Misc. 636.

(b) *Ayrault v. Chamberlain*, 33 Barb. 229, 238.

(c) See N. Y. C. C. P., § 723.

The history of the statutes of jeofails is well given in brief by Clinton, Senator, in *Cheetham v. Tillotson*, 4 Johns. 504, as follows: "At one period parties were so much harassed by writs of error brought for mistakes in orthography or the slightest clerical misprisions, that the chances for justice were forlorn. Redress in a very limited form was indeed granted at common law. This, at first, was not extended beyond the term in which the judicial act was done; for during the term the record was supposed to be in the recollection of the court, but afterward no alteration was admitted. At a subsequent period the rule was more liberally extended; and all the proceedings were considered as only *in fieri*, and subject to the control of the court, at any time before judgment was rendered and enrolled. Such, however, was the general conduct of the courts of common law

The right of disregarding trifling variances proceeds upon the ground that the substantial rights of the parties are set up in the pleadings. Every fact which the party must prove to establish his action or defense must be found in the pleadings in order that the adverse party may not be surprised. (*d*)

THE DOCTRINE OF VARIANCE NARROWED.—And the doctrine of variance has been greatly narrowed by statutes which empower and direct the judge sitting at nisi prius to allow an amendment at the trial upon such terms as to costs, and otherwise, as he may think fit (whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not) in all cases in which such amendment may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties.

Those statutes, together with the change they have induced in the course of judicial decision, may be said to have established the general rule that no variance between the allegations of a pleading and the evidence offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defence on the merits. (*e*)

in England, that justice was entangled in a net of technical form, and the parliament was compelled by twelve different statutes, denominated the statutes of amendments and jeofails, to interfere and remedy the enormous evil. The amendments authorized by these statutes are seldom, if ever, actually made, but their benefit is attained by the courts overlooking the exception."

(*d*) *Wright v. Delafeld*, 25 N. Y. 266, 270.

An amendment that will prejudice the opposite party or take him by surprise, is an amendment of substance, and can be allowed only on terms and conditions. *Riggs v. Chapin*, 7 N. Y. Suppl. 765.

(*e*) *Nash v. Towne*, 5 Wall. 698. The provisions of the codes in this respect are in effect the following sections of the New York Code of Civil Procedure:

§ 539. A variance between an allegation in the pleading and the proof, is not material, unless it has actually misled the adverse party,

REASON FOR LIBERALITY.—The reason for this liberality was well stated by Judge Scofield thus: "The object of pleading is to apprise the opposite party of the charge against him or of the defense interposed, so that due preparation for trial may be made, and not to furnish a sword for defeating a good case on technical and fanciful distinctions which in no manner interfere with the proper decision of the case on its merits." (f)

AMENDMENT TO PROCURE TRIAL OF REAL ISSUE IS A MATTER OF RIGHT.—So there is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and such amendment is not regarded as a matter of favor or of grace. (g)

The purpose is to secure a decision on the real question in controversy between the parties. As soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be

to his prejudice, in maintaining his action or defence, upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

§ 540. Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without cost.

§ 541. Where, however, the allegation to which the proof is directed, is improved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

(f) *Swift & Co. v. Raleigh*, 54 Ill. App. 44.

(g) Lord Justice Bowen, in *Cropper v. Smith*, (No. 1), 26 Ch. D. 710.

done without injustice, as any thing else in the case is a matter of right. (*h*)

(*h*) In *Cropper v. Smith*, 26 Ch. Div. 710, Lord Justice Bowen observed: "The question seems to me to be this, can you, by the imposition of any terms, place the other side in as good a position for the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected. The rule says: 'All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy.' I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs." And again: "I decide the case not upon any ingenious criticism of the words used; at this stage of our legal history we ought not to weigh too nicely the language of pleaders. By modern legislation, and especially by the Judicature Acts, the courts have very fortunately, been invested with large powers of amendment, and by brushing away all legal difficulties the judges may find out what the pleaders really meant, and make all amendments necessary to arrive at the real meaning of the parties." *Chamberlain v. Boyd*, 11 Q. B. D. 415. What the matter in controversy really is must be determined by the court upon the evidence and pleadings. Maule, J., in *Wilkin v. Reed*, 15 C. B. 192; *Blake v. Done*, 7 H. & N. 465; *Cleaves v. Lord*, 3 Gray 66; *Stone v. White*, 8 id. 589; *Peck v. Waters*, 104 Mass. 345; *Keller v. Webb*, 126 id. 393; *Whitney v. Houghton*, 127 id. 527.

In *Wilkin v. Reed*, 23 L. J. C. P. 193, 15 C. B. 192, the declaration alleged, that the defendant had fraudulently represented to the plaintiff that the reason why he had dismissed a clerk, whom the plaintiff was about to take into his service, was the decrease in his business, and that the defendant had recommended the plaintiff to try the clerk, and had knowingly suppressed the fact that he had been dismissed on account of dishonesty. At the trial it appeared in evidence that the plaintiff had asked the defendant the cause of the clerk's dismissal, and had been told in reply that it was in consequence of the defendant's business having fallen off; that this answer was true but that the clerk had been guilty of embezzlement while in the defendant's employ, and that the defendant, having been asked no questions respecting the clerk's honesty, had not communicated that fact to the plaintiff. On this evidence the plaintiff's counsel applied to amend the declaration, by striking out the allegation, that the defendant had fraudulently misrepresented the reason of dismissal, and by substituting for it an averment, that the defendant

But an amendment should not be allowed for the purpose of trying a question which has arisen at the trial, but is not that which the parties came to try. (i)

AMENDMENT ON TERMS AT ANY TIME.—And leave to amend pleadings ought to be granted even at the last moment, where it is necessary to enable the court to finally dispose of the questions between the parties, if the party making the application is acting *bona fide*, and his opponent can be fully indemnified against any injury occasioned to him; but such leave is an indulgence, and ought only to be granted on terms. (j)

had fraudulently suppressed the fact that the clerk had been guilty of dishonesty. Mr. Justice Maule, however, who tried the case, refused to allow the amendment, on the ground that the real question in controversy was not whether the clerk had been dishonest, or whether his former master had suppressed the fact of his dishonesty, but whether the real cause of his dismissal had been truly stated. The Court of Common Pleas afterwards supported this ruling, and held, first, that it is a matter, not of law, but of fact, what "the real question in controversy between the parties" is; next, that this matter of fact must be determined, not by the jury, but by the judge on a careful consideration of the pleadings and the evidence; and, lastly, that "the question in controversy" is, in other words, the question which both parties really intended to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants.

(i) *Wilkin v. Reed*, 15 C. B. 192; *Lucas v. Tarleton*, 3 H. & N. 116; *Ritchie v. VanGelder*, 9 Exch. 762.

(j) *Truport, In re Trafford v. Blanc*, 34 W. R. 56; Kay, J., following *Tildesley v. Harper*, 10 Ch. D. 393. In a comparatively recent case Brett, M. R., said, and the other Lord Justices concurred: "The rule of conduct of the court in such case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side." *Clarapede & Co. v. Commercial Union Association*, 32 W. R. 263. See, also, the judgment of Bowen, L. J., and *East Boston Timber Co. v. Persons*, 2 Hill 126. At common law the court had power to allow an amendment of the pleadings in any case until final judgment and after motion in arrest of judgment. Taft, C. J., in *Chaffer v. Rutland R. Co.*, 71 Vt. 384,

ALLOWANCE IN DISCRETION OF COURT.—Usually, to allow or refuse rests in the discretion of the court; (*k*) and the result in either case is not assignable for error. (*l*)

386. And see *State v. Marsh*, (134 N. C. 184), 67 L. R. A. 179, and note on this specific subject:

In *Tildesley v. Harper*, 48 L. J. Ch. 495, 10 Ch. D. 393, the facts were as follows: The statement of claim alleged that the defendant, in order to induce the plaintiff to grant a lease, had offered him a bonus, or, in other words, a bribe of £500, and had actually paid him £200. These allegations were specifically denied in the statement of defence, but the defendant did not go on to deny that *any* bribe had been offered or given. On these pleadings, the learned judge held at the trial that the giving of *some* bribe was admitted on the statement of defence; and—refusing the defendant's application to allow an amendment—gave judgment for the plaintiff. The defendant appealed; and the Lords Justices, apparently almost as a matter of course, decided that the judgment must be set aside, with liberty to defendant to amend his statement on payment of costs, the plaintiff being also at liberty to amend his pleadings, if necessary. Lord Justice Bramwell in this case, while discussing the circumstances under which the power of amendment should be exercised, very justly observed, that "leave to amend should always be given, unless the judge were satisfied that the party applying for it either had acted *mala fide*, or had by his blunder caused some injury to his opponent, which could not be adequately compensated by the payment of costs or otherwise." This case was followed in *Claparede & Co. v. Commercial Union Association*, 32 W. R. 151, and in *Trafford v. Blanc*, 34 id. 56, and *Steward v. Metropolitan Tram-way Co.*, 16 Q. B. D. 181.

In *Steward v. Metropolitan Tram-way Co.*, 16 Q. B. D. 178, a tramway company were sued for damages caused by their negligence in allowing their tram-way to be in an unsafe and defective condition. By their defense they denied negligence. More than six months after the delivery of the defence the defendants applied for an order to amend it, by adding an allegation that under an agreement the liability to maintain the roadway had, previously to the cause of

(*k*) *Pacific Mill Co. v. Inman, Poulsen & Co.*, (Oreg.) 90 Pac. 1099.

(*l*) *Marine Insurance Co. v. Hodgson*, 6 Cranch 206; *Walden v. Craig*, 9 Wheat. 576; *Chirac v. Reinicker*, 11 id. 280; *Wright v. Hollingsworth*, 1 Peters, 165; *United States v. Buford*, 3 id. 12; *Morgan v. Pike*, 14 C. B. 473; *Schuster v. Wheelwright*, 8 C. B. N. S. 383; *Byrd v. Nunn*, 7 Ch. D. 284, C. A.

THE APPELLATE COURT WILL NOT INTERFERE with that discretion, unless in an extreme case, where it is obvious that some serious mischief would result from non-interference.(m) And a new trial will not be directed upon the ground of surprise occasioned by an amendment at nisi prius, unless substantial injustice has been done.(n)

UNNECESSARY AMENDMENT NOT ALLOWED.—The court, in its discretion, may allow an amendment to set up in another form the transaction first set out in the complaint;(o) but will not usually allow an amendment which would be of no avail. If all the evidence that could be introduced under

action, been transferred to the local authority of the district. It was held inasmuch as the six months within which, by statute, notice of action must be given to the local authority had elapsed, and the remedy against them was lost to the plaintiff, his position would be prejudicially affected by the proposed amendment, and it therefore ought not to be allowed. Pollock, B., said: "The test as to whether the amendment should be allowed is, whether or not the defendant can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed. No doubt in saying so we take away from the defendants the right to defend themselves by this particular plea. But that is only one of many cases in which the court have said that if the defendant chooses to conduct his defence to a certain point on certain lines, and lead the plaintiff on into a certain position, the defendant has no right to change his front. That is only acting on the well-known doctrine of estoppel, and, in common fairness and equity, the defendants are estopped from saying they are not the proper defendants."

(m) *Golding v Warton Salt Works Co.*, 1 Q. B. D. 374.

If the court in its discretion permits an amendment of the complaint after the trial has commenced, the defendant if he does not ask for delay cannot claim error. *Kennenberg v Neff*, 74 Conn. 62.

(n) *White v S. E. Ry. Co.*, 10 W. R. 564. Sometimes the amendment is made at nisi prius, subject to the approval of the court. *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558. In *Martyn v. Williams*, 1 H. & N. 817, the court disallowed an amendment so made at the trial, on the ground that the amendment made the pleading reasonably open to a demurrer.

(o) *Mechanics' Bank v. Woodward*, 74 Conn. 689.

the amendment is already in, or can be put in, under the original complaint, the amendment is plainly unnecessary. (p) If, however, the trial court allows such an amendment the appellate court will not review the discretion. (q)

AMENDMENT TO CONFORM TO PROOF.—Whether or not the plaintiff will be allowed, on the trial, to amend his complaint to conform to the facts proved is also in the discretion of the court. (r)

Generally such an amendment will be allowed as a matter of course if there has been introduced sufficient evidence to make out a case. (s)

AMENDMENT CANNOT INTRODUCE A NEW CAUSE.—The power of amendment is limited by the rule that an amendment shall not bring in a new cause of action. It is better that there should be no trial at all, than that a plaintiff

(p) *Sellick v Head*, 77 Conn. 15; *White River Ry. Co. v Batesville & W. Tel. Co.*, (Ark.) 98 S. W. 721.

(q) *B. Shoninger Co. v. Mann*, 121 Ill. App. 275.

(r) *Chicago, R. I. & P. R. Co. v Shaw*, 63 Neb. 380.

(s) *Griffin v. Société Anonyme, etc.*, (Fla.) 44 So. 342; *Hobbs v. Ray*, (Ky.) 96 S. W. 589; *Bellinger v. German Ins. Co.*, 95 App. Div. 262; *Mathieson Alkali Works v Mathieson*, 150 Fed. 241. Such an amendment is usually made at the close of the evidence. *Sidenberg v. Ely*, 90 N. Y. 257.

The language of the court in *Romeyn v Sickels*, 108 N. Y. 650, will be found to explain much of the apparent conflict in the cases. There it was said that pleadings cannot be amended "in a material respect except at a time which would give the party against whom the amendment is allowed a right and opportunity to meet by proof the allegations made against him. There are cases which having proceeded in disregard of the pleadings and wherein the whole case has been presented by both parties in their proofs without objection, in which an amendment has been allowed, after the evidence is closed to conform the pleadings to the proofs; so also where the court can see that a trial has been had upon the real issue without objection, it will not disturb a recovery upon the ground that it was not embraced in the pleadings; but when the objection has been properly taken or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings."

should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it on the evidence, to amend so as to raise another and different cause of action. As Lord Justice Bramwell said: "If pleadings are to be of any use, a man should be bound by the statement of his case, so that a defendant may know what he has got to answer. Otherwise pleadings are a snare and a delusion." (t)

BY THE TERM "CAUSE OF ACTION" is meant the state of facts on which the plaintiff's right of recovery is grounded, not the statement set out in the complaint. (u)

For example, it is improper to allow a complaint to be so amended as to change an action on contract to a suit for specific performance; (v) or an action for negligence into one for assault. (w) And a complaint which exhibits a cause of action upon the common law liability of a carrier cannot be amended so as to set up a cause of action arising upon liability under a statute. (x)

A NEW CAUSE OF ACTION IS NOT STATED by adding counts on special contract to the common counts; (y) nor by adding

(t) *New Zealand & Australian Land Co. v. Watson*, 7 Q. B. D. 382. See also *Bradworth v. Foshaw*, 10 W. R. 760, *per curiam*; *Riley v. Bazendale*, 30 L. J. Exch. 87, 88, Martin, B.; *Newby v. Sharpe*, 8 Ch. D. 39, C. A.; *Laird v. Briggs*, 19 id. 22, C. A.; *Smith v. Palmer*, 6 Cush. 513; *Wood v. Denny*, 7 Gray, 540; *Outter v. Richardson*, 125 Mass. 72; *Kellogg v. Kimball*, 142 id. 124.

(u) *Myers v. Moore*, (Neb.) 110 N. W. 989. And see *supra*, CAUSE OF ACTION.

(v) *Zoller v. Kellogg*, 66 Hun 194. So, to change an action for malicious prosecution to one for false imprisonment, (*Cumber v. Schoenfeld*, 34 N. Y. St. 770); or an action for goods sold and delivered to the defendant into one for goods sold and delivered to another (*Cox v. Halloran*, 64 App. Div. 550).

(w) *Block v. Third Ave. R. R. Co.*, 60 App. Div. 191. See *Wills v. Metropolitan Ry. Co.*, 76 App. Div. 340.

(x) *Exposition Cotton Mills v. West. & Atl. R. Co.*, 83 Ga. 441.

(y) *Owensboro Wagon Co. v. Hall*, (Ala.) 43 So. 71.

an averment of "due care" to a declaration in an action for personal injuries; (z) nor by presenting a *quantum meruit* count when the complaint originally sought to recover on a contract. (a)

THE RECOVERY A BAR.—The amendment is improper which so changes a cause of action that a recovery upon the original complaint would be no bar to a recovery upon the amended complaint. (b)

ENOUGH TO AMEND BY.—An amendment is the correction of some error or mistake in a pleading already before the

(z) *Madl v. Chicago City R. Co.*, 121 Ill. App. 602.

In an action *ex delicto* a new count may be added describing in a different way the same wrongful act. *Peery v. Railroad*, 122 Mo. App. 177.

(a) *Limerick v. Lee*, 17 Okla. 165.

(b) *Davis v. N. Y. L. E. & W. R. R. Co.*, 110 N. Y. 646; *Barnum v. Williams*, 91 App. Div. 464.

By § 723, N. Y. C. C. P., it is provided that "the court may upon the trial, or at any stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, * * * where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved."

Under this section it is held that an amendment may be allowed though it changes the cause of action and substitutes another belonging to a different class, when the result sought to be reached is the same and the amendment does not affect the substantial purpose of the action. *Rubin v. Maine S. S. Co.*, 51 Misc. 665, following *Deyo v. Morss*, 144 N. Y. 216, where it was said that the power of the court "to grant or deny the relief, or to impose such terms as justice may require, is an adequate protection against an oppressive exercise of the power." If a variance between pleading and proof results from evidence admitted without objection, it will be deemed on appeal that amendment was made in accordance with the permission of the above section (*Brighton v. Clafin Co.*, 84 App. Div. 557; *Leiser v. McDowell*, 69 App. Div. 444)—this for the purpose of sustaining the judgment, not to reverse it. *Lieken v. Staten Island, etc., R. Co.*, 64 App. Div. 327; *Riggs v. Chapin*, 7 N. Y. Suppl. 765.

CHAPTER IV.

DEMURRER TO EVIDENCE.

EXPLANATION OF THE TERM.—In some cases, when the pleadings terminate in an issue *in fact*, joined to the jury, the party (whether plaintiff or defendant), who takes the negative side of the issue, may withdraw the examination of the cause from the jury, to the court, by demurring to, (or upon), *the evidence* exhibited by the adverse party, in support of the affirmative of the issue.(a)

(a) Co. Litt. 72; 5 Co. 104, a; Cro. Eliz. 752; Aleyn, 18 T. Ray. 404; Bac. Abr. *Pleas*, &c. N. 7; Bull. N. P. 313; Reg. Pl. 129. This demurrer is analogous to a demurrer to a pleading. *Copeland v. New England Ins. Co.*, 22 Pick. 138; *Forsyth v. Hooper*, 11 Allen 421. It questions only the sufficiency or probative effect of testimony, and does not question the propriety in its introduction or preserve any objection thereto. *Southern Railway Co. v. Leinart*, 107 Tenn. 635.

SUBSTITUTED PROCEDURE.—In some states where the practice of demurring to evidence has gone into disuse, "a practice has been recognized that the defendant may, at the close of the plaintiff's testimony, *move* the court to *direct a verdict* for the defendant." *Fox v. Iron Co.*, 89 Mich. 387, 399.

Sometimes this demurrer is supplanted by a *motion to exclude the evidence* from the jury (*Railroad Co. v. Woodson*, 134 U. S. 621). which is in the nature of a demurrer to evidence (*Kane v. Cicero & Proviso Electric Ry. Co.*, 100 Ill. App. 181, 183). But a statement by the defendant at the close of the plaintiff's evidence that the defendant will urge that the plaintiff's evidence, standing alone, is insufficient for recovery, and then offering his evidence, is not a demurrer to evidence nor equivalent thereto. *Morrow v. Fleming*, 29 Tex. Civ. App. 547.

Again, a demurrer to evidence, in so as far as the demurrer is concerned, and a *motion to set aside the verdict* of a jury as contrary

By this proceeding, the issue *in fact*, closed to the jury, is exchanged for an issue *in law*; and on the determination of this latter issue, either way, judgment follows, as it would

to the evidence, rest on precisely the same principles. *Hysell v. Coal & Manufacturing Co.*, 46 W. Va. 158.

So, in many states, a request for an *instruction* that even if the adversary's evidence be admitted to be true *he cannot recover*, has taken the place of a demurrer to evidence. *Bank v. Simpson*, 152 Mo. 638; *Neiningger v. Cowan*, 101 Fed. 787; *Parks v. Ross*, 11 How. 362.

MOTION FOR A NONSUIT.—In New York, and in some other states, this demurrer is now superseded by a *motion for a nonsuit*, at the close of the plaintiff's evidence. *Lomer v. Meeker*, 25 N. Y. 361. A nonsuit is where a judge who has not the power of deciding the facts rules, as a matter of law, that there is no evidence on which the jury, or whatever tribunal had to decide the facts, could properly find facts sufficient to support the plaintiff's case. Lord Blackburn in *Singer Manufacturing Co. v. Loog*, 8 App. Cas. 28. Baron Parke once observed that "At common law, the subject has a right to be nonsuited at any stage of the proceedings he may please, and thereby to reserve to himself the power of bringing a fresh action for the same subject-matter." *Outhwaite v. Hudson*, 7 Exch. 381. In *Haskell v. Whitney*, 12 Mass. 47, the parties had agreed to refer the action and all demands; after which the plaintiff moved for leave to discontinue. The court held that the agreement to refer, being entered on the docket, was not a mere agreement *in pais*, but was a vested right in the defendant to proceed, if he should see fit, agreeably to the forms of the rule, and that the plaintiff could not afterward become nonsuit, or discontinue, without the consent of the defendant. In *Locke v. Wood*, 16 Mass. 317, after a verdict was returned, but before it was recorded, the plaintiff moved for leave to discontinue; but the court refused to grant it, as it might be dangerous to establish such a precedent. These cases proceeded on the ground of a right obtained by the defendant, of which the plaintiff cannot, at his own pleasure, deprive him. *Means v. Welles*, 12 Met. 361, 362. This is the law of Massachusetts, whatever it may be elsewhere. As a nonsuit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a nonsuit. It is said in *March on Arbitraments*, 215, that a nonsuit "is but like the blowing out of a candle, which a man, at his own pleasure, lights again." Quoted by Metcalf, J., in *Clapp v. Thomas*, 5 Allen, 159, 160. The action of the presiding judge at the trial of a

have done, on a *verdict* found for the same party, on the issue in fact. (b) .

A DEMURRER TO FACTS.—A demurrer of this kind, though called a demurrer *to evidence*, is essentially, as will appear in the sequel, a demurrer to *the facts shown in evidence*; and in this respect, it differs from the demurrer, already treated of, which is taken to the facts shown in the pleadings.

THE OBJECT OF A DEMURRER TO EVIDENCE is, to bring in question, on the record, the *relevancy* of the evidence on one side, to the whole issue; and to make the question of its *relevancy* the sole point, on which the issue in fact is to be determined. For upon this demurrer, the issue *in fact* is determined by the determination of the issue *in law*: so that a decision on the *demurrer*, in favor of either party, is, in effect, a finding of the issue *in fact* in favor of the same party.

RELEVANCY FOR THE COURT—WEIGHT FOR THE JURY.—It must be premised, that the *relevancy* of evidence to any given issue (i. e. its *conduciveness* or *tendency* to prove or disprove the issue), is matter of *law*, to be determined by *the court*; but its relevancy being established—its *weight*, or the question *how far* it conduces to prove the issue, or fact in dispute, is matter of fact, to be determined by *the jury*. (c)

case, is an exercise of his judicial discretion and cannot be supervised by an appellate court. *Shaw v. Boland*, 15 Gray, 573.

The practice of moving for a nonsuit has, over a demurrer to evidence, the advantage of being more comprehensive; including cases where, by reason of the *great preponderance* of evidence against the plaintiff, no verdict in his favor should be allowed; which a demurrer to evidence would hardly reach. A nonsuit should be granted, in all cases where the evidence is such, that the court, on review, would *set aside a verdict* (for the plaintiff) founded on it.

(b) *Loob v. Fenaughty*, 60 Kan. 570; *Crowe v. People*, 92 Ill. 431; *Milliken v. Commission Co.*, 202 Mo. 637; *Garrett v. Ramsey*, 26 W. Va. 345.

(c) Doug. 375; *Gibson v. Hunter*, 2 H. Black. 205.

[The court, therefore, cannot determine the effect of conflicting or

In other words—whether that, which is offered as evidence to any given point is evidence to the point, is a question of *law*; whether, being evidence, it is, or is not, *sufficient to prove* the point is a question of *fact*.

Evidence is always *relevant* to any issue, which it conduces, *in any degree*, to prove. And as its *relevancy* is the only point, of which the court can judge, on demurrer; it follows, that it can never be safe for a party to demur to evidence, which is clearly relevant to the *whole* issue(*d*), i. e., which clearly conduces, *in any degree*, to prove the whole affirmative side of the issue. But where the whole evidence exhibited in support of the affirmative of the issue, is relevant to a *part* only of the issue, it may be safely demurred to; because, in such a case, the evidence *could not* warrant a finding of the issue by the jury, in favor of the party exhibiting the evidence.

THE WHOLE EVIDENCE TO BE DEMURRED TO.—As the question, raised by this demurrer, is, whether the evidence demurred to is sufficient in *law* to maintain the affirmative of the issue in *fact*; it is manifest, that the demurrer should be taken to the *whole* evidence, exhibited by the adverse party.(*e*)

Since the *whole* of it may be sufficient to maintain the issue, when a *part* of it would not be so. And as that party

contradictory evidence. *Coon v. Railway Co.*, 75 Kan. 282, 285; *Farnsworth v. Clarke*, 62 Kan. 264, where it was said that in order to sustain a demurrer to the evidence the court must be able to say, *as a matter of law*, that the party introducing the evidence has not proved his case.

So on a Motion for a Nonsuit the court cannot pass upon the merits but must decide just the one question whether or not, *as a matter of law*, the plaintiff has introduced any evidence which he can ask the jury to pass upon in support of his case. *Carroll v. Grande Ronde Electric Co.*, (Oreg.) 90 Pac. 903; *Tuck v. McAllister, etc., Express Co.*, (R. I.) 67 Atl. 428].

(*d*) *Gibson v. Hunter*, 2 H. Black. 205.

(*e*) Salk. 284; Bull. N. P. 314.

would have had the benefit of *all* the evidence, exhibited on his part, before the *jury*, from whom the issue is withdrawn by the demurrer; he is clearly entitled to the opinion of the court, upon the *relevancy* of the whole of it, on the demurrer. If therefore any particular *part* of the evidence, offered in support of the issue, is objected to, as irrelevant, but admitted by the judge; the party objecting cannot demur to that part alone(*f*); but should file his bill of exceptions, or move for a new trial.

DEMURRER ONLY TO EVIDENCE SUPPORTING AFFIRMATIVE.—It appears manifest, from the nature and office of a demurrer of this kind, that it can be taken only to the evidence of that party, who takes *the burden of proof*, on the issue; and this is regularly, the party who takes the *affirmative* of the issue. For it is not incumbent on the other party to *prove* his side of the question; since, as a general rule, the finding must, of course, be in his favor, unless the affirmative is proved against him.(*g*)

THIS DEMURRER ADMITS FACTS.—A demurrer to evidence, when accepted by the adverse party, or allowed by the court, puts an end to the trial of the question of *fact*, by the jury; and refers to the court the application of the *law* to the facts shown in evidence. The demurrer, therefore, when properly

(*f*) *Id.*

(*g*) [*Standley v. N. W. Mut. Ins. Co.*, 95 Ind. 254; *Stiles v. Inman*, 55 Miss. 469.

So the demurrer comes too late after the demurrant has opened his proof. *Sands v. Southern Ry. Co.*, 108 Tenn. 1, 6.

But in West Virginia, following the Virginia decisions, it is the accepted practice that either party may demur, and that all the evidence must be certified and considered by the court, giving the demurree the benefit of all just inferences and disregarding the demurrant's evidence wherein it conflicts with that of the demurree. *Bowman v. Dewing & Sons*, 50 W. Va. 445, modifying the rule of *Bennett v. Perkins*, 47 W. Va. 475.

The motion for a nonsuit may also be made at the close of the whole evidence on both sides.]

tendered, *admits* the facts thus shown; but denies their *sufficiency in law*, to maintain the issue in favor of the adverse party. (*h*)

In the nature of the thing, therefore, *the fact* or *facts*, which the evidence exhibited affirms, must be ascertained, before the question of law, intended to be raised by the demurrer, can arise. (*i*)

For, confessing simply the existence of *the evidence* offered, is not confessing the *fact*, intended to be proved by it; nor is a confession of *the truth* of the evidence, in all cases, and necessarily, a confession of the *fact* intended to be proved by it.

And from this last consideration arises the necessity of requiring the party, demurring to evidence, to make, upon the record, certain *admissions* which will be hereafter stated and explained, and without which the opposite party cannot be required to join in demurrer; nor, if he does join, can the court pronounce any judgment upon it.

ANY KIND OF EVIDENCE MAY BE DEMURRED TO.—Doubts, which no longer exist, were formerly entertained, as to *the kind* of evidence, which might properly be demurred to; but it is now well settled, that evidence of *any* kind, written or parol, direct or circumstantial, is a subject of demurrer:

(*h*) Co. Litt. 72; 4 Co. 104. a; Bac. Abr. *Pleas*, &c. N. 7; *Gibson v. Hunter*, 2 H. Black. 205-6; [*Joliet, A. & N. Ry. Co. v. Velle*, 140 Ill. 59; *Milburn v. Phillips*, 136 Ind. 684; *Rogers v. Hodgson*, 47 Kan. 276; *Young v. Webb City*, 150 Mo. 333; *Bensiek v. Transit Co.*, 125 Mo. App. 121, 128; *Hopkins v. Bowers*, 111 N. C. 175, *Watts v. Southern Bell, etc. Co.*, 100 Va. 45; *Jones, Infant, by, etc.*; v. *O. D. C. M.*, 82 Va. 140].

So on a motion for a nonsuit or for a peremptory direction that a verdict be rendered, not only the facts proved by the evidence must be admitted by the party moving, but also the facts which the evidence may legally conduce to prove—as was the case with a party demurring to evidence. *Colegrove v. N. Y. & N. H. R. Co. et al.*, 20 N. Y. 492. See also *Ernst v. Hudson Riv. R. Co.*, 35 N. Y. 9, 25; *Fox v. Iron Co.*, 89 Mich. 389, 399].

(*i*) *Gibson v. Hunter*, 2 H. Black. 205-6.

Though the manner of framing the demurrer, and of making the necessary admissions upon the record, is regulated by the nature of the evidence demurred to. (j)

When all the evidence, exhibited in support of the affirmative of the issue, is *written*, (as where, on the general issue, the plaintiff exhibits a *bond*, as evidence of the debt for which he sues, or a *deed of conveyance*, or *record*, as evidence of his title to land demanded), all the authorities, ancient and modern, agree that the defendant may demur to the evidence (k): there being, in such a case, no danger of a *variance*, in the statement of it. But how far *unwritten* evidence is liable to be demurred to, is a point not fully settled, in the older books. (l)

According to an opinion, formerly held by some, a party, exhibiting *parol* evidence in support of an issue, is never bound to join in a demurrer to it; because it is *uncertain* (m) —that is, because no *tenor* can be predicated of it; and therefore, there is danger of a *variance*, in stating it upon the record.

But there seems, now, to be no doubt that evidence of *any kind*, exhibited in support of an issue, may be demurred to, under the restrictions, or conditions, prescribed in the five following rules: so that if these conditions are complied with, by the party demurring; the opposite party must join in the demurrer, or *waive* the evidence.

1. Though all the evidence, exhibited in support of the issue, rests in *parol*; yet, if both parties *voluntarily join* in a demurrer to it, and if it is properly framed, and the neces-

(j) *Gibson v. Hunter*, 2 H. Black. 206-9.

(k) 5 Co. 104. a; Cro. Eliz. 752; Com. Dig. *Pleader*, Q. 10; Co. Litt. 72. a; 3 Black. Com. 372; Bac. Abr. *Pleas*, &c. N. 7; Bull. N. P. 313.

(l) Co. Litt. 72. a; 5 Co. 104. a; 1 Lev. 87; *Gibson v. Hunter*, 2 H. Black. 206; Bac. Abr. *Pleas*. etc. N. 7.

(m) Cro. Eliz. 752; Com. Dig. *Pleader*, Q. 10; Bac. Abr. *Pleas*, etc. N. 7.

sary *admissions*, hereafter to be stated, are entered upon the record; the court must give judgment upon it. (n)

2. When in support of the issue, a party exhibits evidence, written or parol, for the purpose of proving any *definite fact*, the opposite party may, by expressly admitting *the fact itself*, upon the record demur, and oblige the party, exhibiting *the evidence*, to join in the demurrer, or to *waive* the evidence. (o)

For the fact being thus admitted; the question of law is distinctly presented to the court, upon the face of the record. Thus if, in *trover* against a bailee, or finder of goods, the only evidence exhibited, of a conversion, is such as goes to prove *mere negligence*, on the part of the defendant, in keeping the goods; the defendant, by admitting, upon the record, *the fact* of negligence in the keeping, may demur, and oblige the plaintiff to join, or waive the evidence. And the defendant, in this case, would be entirely safe in making this confession; because *mere negligence* never constitutes a conversion, in *trover*.

3. When *parol* evidence, exhibited in support of the issue is *certain and direct*, the adverse party, by entering the evidence upon the record, together with an admission that it is *true*, may demur to it, and oblige the party exhibiting it, to join in the demurrer, or waive the evidence. (p)

For in this case, an admission of the truth of the *evidence*, (which by the supposition is *certain*, and *direct*), is an admission of the *fact* affirmed by it. (q)

(n) Cro. Eliz. 752; *Gibson v. Hunter*, 2 H. Black. 206; Bac. Abr. *Pleas*, &c. N. 7.

(o) Sty. 22, 34; Aleyn, 18; *Gibson v. Hunter*, 2 H. Black. 207-8.

(p) Aleyn, 18; *Gibson v. Hunter*, 2 H. Black. 207-8; Com. Dig. *Pleader*, Q. 10; 5 Co. 104. a; Co. Litt. 72. a; Bac. Abr. *Pleas*, &c. N. 7; Bull. N. P. 313.

(q) To understand this, and the two following rules, in the text, it is necessary to distinguish correctly between the several *kinds* or *qualities* of evidence, of which they are predicated. As I understand

4. If the evidence exhibited is 'LOOSE AND INDETERMINATE;' the adverse party cannot demur to it, without stating it upon the record, as *certain and determinate*, and admitting it, in *that* form, to be true. (r)

Thus, if a witness testifies, in support of the issue, that a fact is thus, *according to his present impression, recollection or belief*; the adverse party, to entitle himself to demur to it, must state the evidence upon the record, as 'certain,' i. e.; as affirming *absolutely*, that the fact is thus, and must admit the evidence, as thus stated, to be *true*. For in this case, confessing the testimony, *in the words* of the witness, to be true, would not amount to a confession of *the fact* testified about; but merely to an admission of the witness's *belief* of the fact: an admission, which, if allowed as sufficient, would refer *the weight* of the testimony to *the court*. And as the jury, from whom the demurrer withdraws the trial, *might*, from the testimony above supposed, have found *the fact* testified about; the party exhibiting the testimony, is entitled to the full effect of such a finding. It follows, therefore, that unless the party, demurring to such evidence, makes the ad-

these distinctions, evidence is 'CERTAIN,' and 'DIRECT,' within the meaning of the rule, when it *explicitly, absolutely, and without qualification*, affirms the particular fact, intended to be proved by it: As, when a witness positively asserts a fact to be thus, or thus, without reservation. According to this explanation, evidence, which the rule terms 'certain,' is contradistinguished from such, as is called, 'loose and indeterminate;' by which appears to be meant evidence, affirming a fact, *doubtfully*, or with some *reservation*: as when a witness declares a fact to be thus, or thus, '*according to his best recollection or belief*.'—'CIRCUMSTANTIAL' evidence is that, which, by affirming some *collateral* matter of fact, conduces thereby to prove *another* (the principal) fact, *consequently*, as an *inference*, or *conclusion* from the former. See Will on Circumstantial Evidence, pp. 15, 16. And in this sense, 'circumstantial' is distinguished from 'direct,' evidence; which is such, as in *express and direct* terms affirms the *principal* fact, or matter immediately in issue.

(r) *Gibson v. Hunter*, 2 H. Black. 207, 208; *Aleyn*, 18; *Bac. Abr. pleas*, etc. N. 7; *Bull. N. P.* 313.

mission, required by this rule, the opposite party is not bound to join in the demurrer.

5. When the evidence, to which a demurrer is offered, is 'CIRCUMSTANTIAL,' the party demurring must distinctly admit, upon the record, *every fact*, and *every conclusion*, in favor of the opposite party, which the evidence *conduces to prove*—in other words, every fact, which the jury *might* have inferred from it, in his favor (s): otherwise, he is not bound to join in the demurrer; because, without such admission, *the weight*, as well as the *relevancy* of the evidence, would be referred to *the court*. For in this, as in the former case, merely confessing the evidence to be *true*, is not a confession of any *fact*, on which the proper question of law can arise: since the truth of all circumstantial evidence, however strong it may be, is always consistent with the possible *non-existence* of the fact, which it conduces to prove. If however, the party demurring makes the admission, required by the rule; the other party must join in demurrer, or *waive* the evidence. But without such admission, the latter is not bound to join; and if he does, the court can pronounce no judgment upon the demurrer.(t)

(s) *Alcyn*, 18; *Gibson v. Hunter*, 2 H. Black. 187, 209; *Thornton v. Bank of Washington*, 3 Peters, 40.

(t) *Sty.* 34. *Gibson v. Hunter*, 2 H. Black. 209.

ILLUSTRATION.—This rule may be illustrated, by the following case: In an action by the holder, against the acceptors, of a bill of exchange, payable to a *fictitious payee*, or order, and which, after the acceptance, had been indorsed by the drawers, in the name of the *fictitious payee*, for valuable consideration, to the plaintiff—the latter exhibited evidence of a long course of dealing in similar bills, between the drawers and acceptors—for the purpose of raising a *presumption*, from these circumstantial facts, that the defendants at the time of accepting the bill knew the payee to be *fictitious*; and of then urging as matter of law, that if this presumption was established, the defendants were bound by their acceptance. To this evidence the defendants demurred, without admitting, upon the record, their *knowledge*, at the time of accepting the bill, that the payee was *fictitious*; and the plaintiff joined in demurrer. But it was resolved,

WHEN A VENIRE DE NOVO ISSUES.—From the principles already stated, it is apparent, that if the party, demurring to evidence of any kind, does not make, upon the record, the admissions required in the particular case, by the preceding rules; and the opposite party nevertheless joins in the demurrer; the court can give *no* judgment on the demurrer; but must award a *venire de novo*—that the issue in fact may be referred to another jury. (*u*)

THIS DEMURRER DOES NOT TOUCH PLEADINGS.—As the only point in issue, on a demurrer to evidence, is whether the evidence is sufficient, in law, to maintain *the issue in fact*; no exception can, on such a demurrer, be taken to any defect in *the pleadings*; as the demurrer does not extend to them. (*v*)

ARREST OF JUDGMENT AFTER DEMURRER.—But after the demurrer is determined advantage may be taken of such defects, on motion *in arrest of judgment*, as after verdict. (*w*)

The motion must, however, operate, I conceive, not as such a motion, made after a *general* verdict: for as the issue has not been found by the jury, no fact, not alleged, and not

in the House of Lords, by the unanimous opinion of the Judges, that because the defendant's *knowledge* of the payee's being a fictitious person, (which was the great point of fact in issue), was not *expressly admitted*, on the record; the point of law, intended to be raised by the demurrer, could not arise upon the record; and consequently that *no* judgment could be given upon the demurrer. 2 H. Black. 187-209.

Before this determination in the House of Lords, it had been resolved in B. R. (Doug. 119-134) that on demurrer to *circumstantial* evidence. 'every fact, which the jury could infer' from it, in favor of the party offering it, 'was to be *considered as admitted*,' without any *express* admission upon the record. But, to avoid any doubt that might arise, as to the extent of any such *implied* admission, the rule as now definitively settled by the highest authority, is, as stated above, viz. that every such fact must be *expressly* admitted, upon the record.

(*u*) Bull. N. P. 313; *Gibson v. Hunter* 2 H. Black. 209; Bac. Abr. *Pleas*, &c N. 7.

(*v*) Bull. N. P. 313; Doug. 218-223.

(*w*) Id. *Bank of United States v. Smith*, 11 Wheat. 173.

appearing in the evidence as recited on the record, can be *presumed*, in favor of the party prevailing on the demurrer. The effect of such a motion, therefore, after a demurrer to evidence determined, must be the same, it would seem, as after a *special verdict*; (finding the facts demurred to); from which nothing can be presumed, and by which no defect in the pleadings is aided, except such as would have been aided on *general demurrer*.

ALLOWANCE IN DISCRETION OF COURT.—The party, to whose evidence a demurrer is offered, may always demand the judgment of the court, whether he is bound to join in the demurrer. And if there is no *colorable* cause of demurrer, the court will not allow it—lest justice should be delayed, by frivolous exceptions. (x) An offer to demur to evidence is, therefore, not *stricti juris*.

The whole proceeding, in demurring to evidence—as the *statement* of the evidence, on the record, and the entering of the necessary *admissions*, required by the foregoing rules—is under the direction and control of *the judge*, at *Nisi Prius*, or (if the trial be at bar), of the *court in bank*; and if no plausible cause of demurrer appears; it is the duty of the judge, or court, to disallow it. (y)

PROCEDURE.—On a demurrer to evidence, properly framed, and joinder in demurrer, the usual course is, immediately to discharge the jury of the issue in fact; and if the plaintiff prevails, on the demurrer, the writ of inquiry of damages is executed afterwards. The jury may, however, before they are thus discharged, be required to assess the damages *provisionally* (z): and if the demurrer is determined in the

(x) Aleyn, 18; Sty. 34; Bull. N. P. 313; 2 Rol. Rep. 119; *Gibson v. Hunter*, 2 H. Black. 205, 208; [This is a question addressed to the sound discretion of the trial court. *University of Va. v. Snyder*, 100 Va. 567].

(y) 2 Rol. Rep. 119; *Gibson v. Hunter*, 2 H. Black. 208-9.

(z) 1 Lill. Ab. 441; Bull. N. P. 314 Cro. Car. 148; 1 Ld. Ray. 60; Plowd. 410; *Gibson v. Hunter*, 2 Black. 200. 201; [*Myers v. Hodges*, (Fla.) 44 So. 357].

plaintiff's favor; he will have judgment for the damages, thus previously assessed.

REMEDY FOR IMPROPER RULING.—If a party, offering to demur to evidence, is wrongly overruled by the court; his remedy is by a *bill of exceptions*, and a writ of error, founded upon it. (a)

(a) 9 Co. 13 b; Bac. Abr. *Bill of Exceptions*; *Ib. Pleas.* etc. N. 7; Cro. Car. 342; [*Railroad Co. v. Cross*, 58 Kan. 424; *State v. Hogan*, 131 N. C. 802.

An exception to a ruling denying a motion for a nonsuit is waived, by subsequently giving evidence to the merits. *Desbecker v. McFarlane*, 42 App. Div. 455.

In *Stiles v. Inman*, 55 Miss. 469, 474, it was said that a demurrer to evidence is as much a part of the record as the demurrer to pleadings, or the verdict of the jury, and therefore it is irregular to make the demurrer matter of record by bill of exceptions. And see, *Chesapeake & O. K. Co. v. Sparrow*, 93 Va. 630.

For the *forms* of a demurrer to evidence, and joinders, see Bull. N. P. 314; *Gibson v. Hunter*, 2. H. Black. 198-200; and Chitty's Forms, 6th ed. pp. 88, 89.

The Correct Practice is "to reduce to writing a recitation, first, of the organization of the jury; second, a statement of the facts shown in evidence by the plaintiff in support of the issue on his side; and then conclude with the allegation that the said matters are not sufficient in law to maintain the plaintiff's issue—wherefore he prays judgment, etc. The writing incorporating the matters of fact and the formal demurrer should be transcribed on the minutes of the court, and thereby become parcel of the record." *Stiles v. Inman*, 55 Miss. 469, 474 (citing, 2 Tidd's Practice; Walker's Am. Law.) And see, *Golden v. Knowles*, 120 Mass. 336; *Suydam v. Williamson*, 20 How. 435, *Thornton v. Bank of Washington*, 3 Pet. 36].

CHAPTER V.

ARREST OF JUDGMENT AND REPLEADER.

DEFINITION.—To *arrest* judgment, is to *stay* or *prevent* it. This is done, on motion, entered upon the record. (a)

This proceeding most usually takes place, after an issue in fact tried, and *verdict* found; but the motion may also be made, after a *default*, or after a demurrer to evidence determined. (b)

THE PRINCIPLE of this proceeding is, that as the judgment of the court, which is a conclusion of law from the facts ascertained upon the record, must be collected from the *whole* record the party who does *not*, upon the whole record, appear entitled to judgment, cannot have it—even though a *verdict* has been found, or a default suffered, or a *demurrer to evidence* determined, in his favor. For notwithstanding such verdict, default, &c. the whole record may disclose no right of action, or no legal defence, in his favor. (c) And therefore, if a verdict is found for the plaintiff, upon a declaration *radically defective*—or for the defendant, on a plea in bar *totally void* of substance; judgment must, regularly, in either case, be arrested. (d)

(a) 3 Black. Com. 389, 393; Ib. App. No. II. p. xi; Bac. Abr. *Pleas*, &c. M.

(b) 2 Burr. 900; Doug. 218, 223; 2 Stra. 1271; 9 Pick. 546.

(c) 8 Co. 120. b, 133. b; 1 Lutw. 608; 4 Burr. 2146; Wightw. 354; [*Bayard v. Malcolm*, 2 Johns. 550].

(d) It would seem that there must be *always*, (under the Code, or not,) sufficient reasons why *no judgment* should be entered on such a verdict. (See ante, 105.)

A QUESTION OF LAW.—The question, raised by a motion in arrest of judgment, is a question of *law*, arising from the face of the record: judgments being arrested, only for *intrinsic* causes, i. e., such only as are *apparent* on the record. (e)

JUDGMENT NOT ARRESTED FOR FORMAL DEFECTS.—Anciently, judgments were constantly arrested for defects or faults merely *formal*, in the pleadings, or other parts of the record; but by the various *English* statutes of *amendments* and *jeofails*, which extend from the reign of *Edward the Third*, to that of *Anne* (f), this evil has been remedied. And as the law now is, judgments are, by these statutes, protected against arrest, for mere *formal* defects in general, and also for various others, which have been deemed *substantial*, but which are specifically enumerated in, and expressly cured by, some one or other of the same statutes. (g)

(e) 3 Black. Com. 393; [*Washington v. Calhoun*, 103 Ga. 675 *Danley v. Hibbard*, 222 Ill. 88; *McDonald v. Algeo*, 96 Ill. App. 79; *Walker v. Sargeant*, 11 Vt. 327; *Hughes v. Frum*, 41 W. Va. 445; *U. S. v. McKnight*, 112 Fed. 982].

(f) Bac. Abr. *Amendment*, etc. B; [And see *supra*, AMENDMENTS].

(g) [*Huger v. Cunningham*, 126 Ga. 684. Judgment will not be arrested for the omission of the attorney's signature, or for the absence of the similiter (*Huling v. The Florida Sav. Bk.*, 19 Fla. 695; *Charles County v. Mandanyohl*, 93 Md. 150), nor for omissions or mistakes which are obviously mere clerical errors. What are obvious clerical errors and cannot operate to the prejudice of the adverse party, can be cured by amendment at any time (*Briggs v. Mason*, 31 Vt. 433), even after verdict (*Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521), and are embraced within that provision of the codes which makes it incumbent on the court to disregard any error which does not affect substantial rights (N. Y. C. C. P. § 723. See AMENDMENTS).

Instances of such errors are the omission of a word by mistake (*Trapnall v. Merrick*, 21 Ark. 503); the use of "defendant" for "defendants" (*Cutting v. Conklin*, 28 Ill. 506; *Penley v. Record*, 66 Me. 414; *German Exch. Bk. v. Kroder*, 13 Misc. 192); or of "defendant" for "plaintiff" (*Johnson v. Mo. Pac. R. Co.*, 96 Mo. 349); of "property" for "plaintiff" (*Ross v. Banta*, 140 Ind. 120.)

For mere defects or uncertainties in criminal pleading a motion

Independently of any statute-provision, and upon common-law principles, many defects in pleading, which have been formerly deemed *substantial*, and which would be otherwise fatal, are aided by *verdict*: and the principal object of enquiry, under the head of *Arrest of Judgment*, is, *what* defects of this sort are, and what are not, cured by *verdict*, on *common-law* principles? (h)

in arrest will not be entertained though a motion to quash might be successful. *Campton v. State*, 140 Ind. 442. So judgment will not be arrested under an indictment which sets forth all the elements of the offense charged though stating some defectively. *State v. Barnes*, 122 N. C. 1031].

(h) "With respect to such imperfections as are aided by verdict at common law," says Serjeant Williams, "it is to be observed, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." 1 Wms. Saund. 6th ed. 227, 228; 1 Wms. Notes to Saund. 260, 261, ed. 1871. This rule thus laid down has been constantly cited and acted upon. *Smith v. Keating*, 6 C. B. 136; *Kidgill v. Moor*, 9 id. 364; *Lyme Regis v. Henley*, 2 Cl. & Fin. 353; *Delamere v. The Queen*, L. R. 2 H. L. 419; *Smith v. Cleveland*, 6 Met. 332, 334; *Ward v. Bartholomew*, 6 Pick. 409, 413; *Dobson v. Campbell*, 1 Sumner, 319, 326; *Dignam v. Baily*, L. R. 6 Q. B. 47, 54; 10 B. & S. 891, Exch. Cham.; *Worster v. Canal Bridge*, 16 Pick. 541, 550; *May v. Princeton*, 11 Met. 444, 445; *Crocker v. Gilbert*, 9 Cush. 131; *Bartlett v. Crozier*, 17 Johns. 439, 458; *Bayard v. Malcolm*, 1 id. 453, and in error, 2 id. 550; *Williams v. Hingham and Quincy Bridge*, 4 Pick. 341; *Read v. Chelmsford*, 16 id. 128, *Raymond v. Lowell*, 6 Cush. 524; *De Sobry v. Nicholson*, 3 Wall. 420.

The principle of aid by verdict is learnedly stated, and the cases are collected in the notes to *Stennel v. Hogg*, 1 Wms. Saund. 227, 6th ed. and vol. I. p. 260, ed. 1871, and in the notes to *Rushton v. Aspinall*, 1 Smith L. C. 1449, 8th Am. ed.

The rule is thus expressed in *Heymann v. The Queen*, L. R. 8 Q. B. 102: "Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue

JUDGMENT ARRESTED FOR FAULTS IN PLEADINGS OR VERDICT.—*Formal* defects and errors in the record, being now harmless, except on special demurrer; it follows, that judgment can be arrested, for no other than substantial faults; and these may exist, either in the *pleadings*, or, where a verdict has been found, in the *verdict*.⁽ⁱ⁾ Thus, if the *declaration*, on which the plaintiff has obtained a verdict, is *totally defective* in substance, or *varies totally* from the *writ*, (as, if the one sounds in *debt*, and the other in *tort*); judgment may be arrested on the *defendant's* motion: or if—the declaration being good—the plea in bar, on which the defendant has obtained a verdict, is radically defective; judgment may be arrested, on the motion of the *plaintiff*.^(j) In both these cases, the defect, which sustains the motion, is in the *pleadings*.

And if the pleadings are perfect, but the jury find a verdict *varying materially* from the issue, instead of finding the matter in issue itself, either way; judgment will be arrested, for the insufficiency of the verdict.^(k) Because the court cannot learn from it, for which party judgment ought to be given.

In regard to the arresting of judgment, *after verdict*, it is a universal rule, that any defect in the record, which would

involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict."

See also, *Regina v. Goldsmith*, L. R. 2 C. C. 74; *Regina v. Aspinall*, 2 Q. B. D. 48; *Regina v. Oliver*, 13 Cox C. C. 588; *Regina v. Knight*, 14 id. 31; *Regina v. Kelleher*, id. 48; *Bradlaugh v. The Queen*, 3 Q. B. D. 607; *White v. The Queen*, Irish Rep. 10 C. L. 533; *The Queen, v. Stroulger*, 17 Q. B. D. 327.

(i) 3 Black. Com. 393; 1 Salk. 365; [*Brown v. St. L. & S. F. Ry. Co.*, 69 Mo. App. 418].

(j) 3 Black. Com. 395; Cro. Eliz. 778; 2 Vent. 196.

(k) 3 Black. Com. 393.

render a judgment, in pursuance of the verdict, *erroneous*, is a sufficient ground for arresting the judgment.^(l) For no court should do so nugatory an act, as to render a judgment, which, when rendered, must be *erroneous*.

DEFECTS IN THE PLEADINGS.—Under the first of these heads, it is an invariable rule, that *no* defect in the pleadings, which would not have been fatal to them, on *general demurrer*, can ever be a sufficient cause for arresting judgment.^(m) The principle of this rule is apparent, from the consideration, that all merely *formal* defects in pleading are aided, except on *special* demurrer assigning them for cause; and consequently, that all defects, on either side, which would not have been fatal on *general* demurrer, are cured by the adverse party's pleading to *issue*, or by a *default*—in other words, by his omitting to demur *specially*.

It is, however, by no means universally true, *è converso*, that every defect in the pleadings, which would have been fatal on general demurrer, is a sufficient ground for arresting judgment, after a *general verdict*.⁽ⁿ⁾ For if the pleading of the party, for whom such a verdict has been found, is faulty, in omitting some particular fact or circumstance, without which he ought not to have judgment, *but which is, nevertheless, implied in, or inferrible from*, the finding of those facts, which *are* expressly alleged and found; the pleading is aided, (because the omission is supplied), by *the verdict*: in other words, the court, in such a case, must *pre-*

(l) 1 Salk. 77; 2 Roll. Ab. 716; Com. Dig. *Pleader*, S. 47.

(m) 3 Black. Com. 394; Carth. 389; [*Schmidt v. Market St.*, etc., R. Co., 90 Cal. 37; *Scanlon v. People*, 95 Ill. App. 348].

(n) *Id.*; Doug. 683.

By a *general verdict* is meant a verdict, found in the terms of the *issue*. A *special verdict* is one not following the terms of the issue, but finding certain *special facts*, and referring it to the court, as a question of law, whether those facts maintain the issue—a question, bearing a strong analogy to that which is raised by a *demurrer to evidence*.

sume that the fact or circumstance omitted was *proved to the jury.*(o)

THE CRITERION, by which to distinguish between such defects in a declaration, as are, and such as are not, cured by a general verdict for the plaintiff, is laid down by Lord *Mansfield*, in the case of *Rushton v. Aspinall*, to the following effect: Where the *statement* of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor, because—'to entitle him to recover, all *circumstances* necessary, in form or substance, to complete the title so imperfectly stated, *must be proved* at the trial;' and it is, therefore, 'a fair presumption, that they were proved.' But where *no cause of action* is stated, the omission is not cured by verdict. For, as no right of recovery was necessary to be *proved*, or could have been legally proved, under such a declaration; there can be no ground for presuming that it was proved, at the trial.(p) The same criterion extends, *mutatis mutandis*, to defects in the defendant's *plea*, or in any other part of the pleadings.

The ground or principle, on which any fact, not alleged, is to be *presumed*, in support of a general verdict, is, that as the verdict must be considered as *true*, and as founded on *legal evidence* exhibited at the trial; the Court, (which can judge only from the record), must *presume* in support of it, that any and every fact, (not alleged), *the proof of which was necessary to justify* the jury in finding as they have done,

(o) *Id.*; Cro. Jac. 44; 1 Saund. 228. a. (n. 1.); T. Ray. 487; Carth. 304; 1 Salk. 365; Forrest's Rep. 54; [*Ladd v. Piggott*, 114 Ill. 647; *Rogers v. Felton*, 98 Ky. 148; *Read v. Memphis, etc., Gas Co.*, 9 Heisk. 545. So under the codes: *Brown v. Harmon*, 21 Barb. 508; *Wilcox v. Jamieson*, 20 Col. 158; *Hamer v. Rigby*, 65 Miss. 41].

(p) Doug. 683; See Plowd. 202; 1 Saund. 228. c. (n. 1.); 3 Black. Com. 395; 1 Salk. 365; Bac. Abr. *Verdict*, X.: Hob. 56., c. (n. 4.) *Williams*, ed.; Carth. 130; 1 Lev. 308; Cro. Cor. 497; 1 Mod. 292; Com. R. 116; 3 Wils. 274; 4 T. R. 472; 7 Ib. 523; 2 Burr. 1159; 2 Mass. 522; 16 Pick. 30.

was *proved* to them, on the trial. In other words, the court must, in support of such a verdict, presume every thing to have been proved, *without* proof of which, the jury *could not have truly found* from the evidence, as they have found. (*q*) And thus the verdict, by legal and necessary intendment, supplies facts, omitted in the pleadings. (*r*)

(*q*) *Id.*; 1 Vent. 109; 1 Saund. 228. (n. 1.); 2 Ib. 171. c.; T. Ray. 487; 1 T. R. 145, 545; 7 Ib. 518; Bull. N. P. 320, 321; 1 Salk. 130; Cowp. 827. [*Jackson v. Peshed*, 1 M. & S. 234; *Western Stone Co. v. Whalen*, 151 Ill. 472].

(*r*) ILLUSTRATIONS.—This explanation of the principle, on which omissions in the pleadings are aided by verdict, will be found to coincide, in its result, with the statement, given above, of what is to be presumed in support of a general verdict. But as this principle, though simple and rational itself, has often presented nice and difficult questions, in its application to particular cases; a somewhat detailed illustration of it may be useful:

If, in an action of trespass, the declaration omits to lay the trespass on any particular *day*, (an omission, which by the common law, is a good cause of general demurrer), but the defendant pleads to issue, and a general verdict is found against him; the declaration is cured by the verdict. 3 Black. Com. 394; Carth. 389; 2 Salk. 662; 5 Mod. 287; Bac. Abr. *Verdict*, X. For, as the court must presume that the trespass was duly *proved* to the jury; it must also follow, as a necessary presumption, that the wrong was proved to have been done on *some* particular day, and that before the commencement of the suit: Because proof of a trespass *subsequent* to the issuing of the writ, would have been *legally inadmissible*. And thus, all that was necessary to be supplied in the declaration, viz. *some particular time*, when the trespass was committed—is, by legal intendment, supplied by *the verdict*.

Thus also, if in trover for converting, or trespass for taking away, the plaintiff's goods, the declaration omits to allege their *value*; but the defendant pleads to issue, and the jury find a general verdict, with damages, for the plaintiff; the declaration, though it would have been ill, at common law, on general demurrer, is aided by the verdict. 1 Sid. 39; Bac. Abr. *Trespass*, I. 2 (1.); Esp. Dig. 407; 4 Burr. 2455, *arg.* Vide 2 Johns. 421, note. For it must be presumed, from the jury's having assessed the *damages*, that the value was in proof before them. And thus by intendment, as in the last case, the *verdict ascertains* what the declaration had omitted.

Upon the same principle, if a party pleads a grant of any thing,

VERDICT DOES NOT CURE DEFECT IN MATERIAL ALLEGATION.—On the other hand, facts not alleged, and which are *not implied in, or inferrible from*, those which are alleged

lying only *in grant*, (as an incorporeal hereditament), without alleging that the conveyance was *by deed*, and the opposite party, instead of demurring, as he might for the omission of that allegation, traverses the grant, and the jury find it; the omission is aided by the verdict. Hutt. 54; 10 Mod. 301; Bac. Abr. *Verdict*, X; 2 Wils. 376; 1 Saund. 228. b. (n. 1.). For as the court is bound to presume a grant *proved* to the jury; and as nothing, except a *deed* would have been *legal evidence* of this grant; it must necessarily be presumed that a *deed* of grant was proved, on the trial.

If a party pleads the *grant of a reversion*, without alleging the *attornment* of the tenant—which, by the common law, was necessary to the completion of the grantee's title—and on issue joined, the jury find the grant; the pleading is cured—though the omission would have been fatal, by the common law, on demurrer. And the result is the same, whether the finding is upon a special issue, taken on *the grant alone*, or upon the general issue. As where in debt for rent, by the grantee of a reversion, the declaration alleges *the grant*, but omits to state an *attornment*: Here, if the defendant pleads *nil debet*, and the jury find the issue for the plaintiff; the declaration is cured by the verdict. 2 Show. 233; 1 Saund. 228. a. b. (n. 1.); Com. Dig. *Pleader*, C. 87; T. Ray. 487; Bac. Abr. *Verdict*, X.; Lawes' Pl. 48. For, the jury having, under the direction of the judge, found *the grant*; the court must intend, that it was found upon evidence sufficient to prove a *complete* grant.

Again: If, in debt or bond, the defendant pleads *nil debet*, and the plaintiff, instead of demurring, joins in the issue tendered by the plea, and the verdict is for the defendant; the plea is cured, and the defendant entitled to judgment. 2 Wils. 10. For as the plaintiff has, by joining issue on the plea, *waived the estoppel*, which, (if he had demurred), the deed would have furnished, in his favor, and has submitted to the jury the naked question of the defendant's being *indebted*, which the verdict has negatived; the inference must be, that it was *disproved* to the jury.

An example, several times given in the books, of the effect of a verdict, in aiding defective pleadings, is that of a *feoffment* pleaded, without an express allegation of *livery of seisin*; in which case, the verdict, it is said, cures the defect in the pleading. (1 T. R. 145; 4 Ib. 472; 1 Saund. 228 Ib. n. 1.) But with submission, this example seems not to be an instance, in which the pleading is *aided by verdict*, or in which it requires any such aid. For, according to

and found, *cannot* be presumed to have been proved to the jury. In other words, no fact not alleged, can be presumed in support of a verdict, unless proof of its existence must have been *involved in*, or is *inferrible from*, the proof of those which are alleged, and which the verdict has found(s): there being no foundation, furnished by the record, for any intendment or inference, that any other fact, not averred, was *proved* at the trial.

If then, the declaration is totally defective *in substance*—as in the common instance given, of an action of slander for calling the plaintiff a *Jew*—a verdict for the plaintiff will not entitle him to judgment.(t) For the words charged, being not *actionable*, the finding of the jury cannot make them so, and the defect in the declaration is not in the *statement* of the cause of action (for no manner of stating the words can make them actionable); but in the alleged *cause of action itself*. And nothing is *implied in*, or *inferrible from*, the finding, which can constitute a right of recovery.

If the declaration omits to allege any substantive fact,

high and multiplied authority, ancient and modern, the allegation of a feoffment, *without* an averment of livery of seisin, is good, both in substance and form, on *demurrer*. (Co. Litt. 303. b.; Cro. Jac. 441; 8 Co. 82. b; Cro. Eliz. 401; Plowd. 149; Com. Dig. *Pleader*, E. 9; Bac. Abr. *Pleas*, &c. I. 7; Lawes' Pl. 48). For a feoffment, *ex vi termini*, *implies* livery of seisin; since the act of enfeoffing is the delivering of seisin. And therefore, alleging a *feoffment* is, in effect, alleging *livery of seisin*; whereas, in the above case of the grant of a reversion, the attornment is an act, *distinct* from that of the grant itself, and to be done by a different party. And as the former act is, therefore, not *implied* in the latter; the allegation of the one is *not*, by any implication, an allegation of the other. (8 Co. 82 b.)

(s) Doug. 683; 3 Black. Com. 394; 1 Saund. 228. a. b. c. (n. 1.); 1 T. R. 145; 3 Burr. 1728; Cowp. 826; Bac. Abr. *Verdict*, X; 17 Johns. 456; 4 Pick. 341; 11 Mass. 308.

(t) 3 Black. Com. 394; [*Richard v. Travelers' Ins. Co.*, 80 Cal. 505; *Rhodes v. Hutchins*, 10 Col. 258; *McAndrews v. C. L. S. & E. R. Co.*, 222 Ill. 232].

which is essential to a right of action, and which is *not implied in*, or *inferrible from*, the finding of those which are alleged; a verdict for the plaintiff does *not* cure the defect.(u) Thus in assumpsit, if the declaration alleges no consideration, and the jury find a verdict for the plaintiff; judgment must be arrested.(v) For the fact, that the defendant promised, furnishes no legal intendment or inference, that the promise was founded upon any consideration.

Thus also, in an action by a master, for a battery committed upon his servant, if the declaration omits to allege a *loss of service*, in consequence of the beating; a verdict for the plaintiff does not cure the omission.(w) For it is very manifest, that proof of the alleged battery, and of all the other facts usually alleged in such a declaration, does not necessarily involve any proof of a *loss of service*; and therefore no legal intendment can *imply* the latter fact, from the finding of the jury.

Again: If in an action, for an injury done by the defendant's *dog*, to the person or beast of the plaintiff, the declaration omits the *scienter* (an allegation of the defendant's previous *knowledge*, that his dog was addicted to similar mischief); a verdict of 'guilty' will not aid the decla-

(u) Bac. Abr. *Verdict*, X; Com. Dig. *Pleader*, C. 87; 1 Met. 22; [*State v. Keena*, 63 Conn. 329; *Crawford v. Feder*, 34 Fla. 397; *Free v. West Un. Teleg. Co.*, (Ia.) 110 N. W. 143; *Decatur v. Simpson*, 115 Ia. 348 (want of an allegation of negligence); *Pierce v. Younglove*, 46 Ind. 212 (failure to allege a demand).

The defect is cured if a material fact omitted from the pleading is supplied by the defendant's pleading. *Bonds v. Smith*, 106 N. C. 553; *Turner v. Corbett*, 9 Oreg. 79.

But this is not so if such supplied fact is denied in the reply. *Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co.*, 117 App. Div. 215].

(v) 1 Salk. 364; Com. Dig. *Pleader*, C. 87; 7 T. R. 351. (n. 1.); 1 Vent. 27.

(w) Kellw. 71, b. 72. a; 10 Co. 130; Yelv. 90. (n. 1.); 6 Mod. 127; Bac. Abr. *Verdict*, X.

ration.(x) For all the material facts alleged in the declaration, viz. the defendant's ownership of the mischievous animal—the latter's addictedness to similar mischief—and the damage done to the plaintiff—furnish no *legal* inference of the defendant's previous *science*: since proof of any, or all, of the former facts, does not necessarily *involve* any evidence of the latter.

So also, when the right of action depends upon the performance of a *condition precedent*, by the plaintiff, if the declaration omits to allege performance of it, or what is in law equivalent to performance; the omission is incurable by verdict.(y) For in every case of this kind, performance of the condition, or what is equivalent to it, is of the *gist* of the action; and is moreover, a *distinct, collateral* fact, which cannot be *inferred* or *presumed* from the other facts necessary to be alleged.(z) Thus, if A. engages to pay to B. a sum of

(x) 2 Salk. 662; 3 Ib. 12, 13; Bac. Abr. *Verdict*, X.; 1 Ld. Ray. 109; Doug. 683; Esp. Dig. 601-2.

(y) 6 T. R. 710; 7 Ib. 125; 8 Ib. 366; 2 H. Black. 574, 582, n.; 1 East, 203; 2 Saund. 352. (n. 3.); 3 Bulstr. 299; 2 Bos. & P. 447; Com. Dig. *Pleader*, C. 69.

(z) It is said, (1 Saund. 228, b., n. 1.) by Mr. Sergeant *Williams*—an authority, not to be lightly questioned—that 'when a promise depends upon the performance of something, to be first done by him, to whom the promise is made, and in an action on such promise, the declaration does not aver performance by the plaintiff or that he was ready to perform, and there is a verdict for the plaintiff; such omission is *cured by the verdict*, by the common law, but is a fatal objection, after a judgment by default.' But with great deference, the former of these propositions, although apparently countenanced by a general remark of Lord *Mansfield*, in the case referred to by the learned writer, (2 Burr. 900.) appears inconsistent, not only with the whole current of authority; but also with the definite and well established principles, stated and explained in the text. Indeed the principle of the great and standard case, as it may properly be called, of *Rushton v. Aspinall*, before mentioned, seems to stand in direct opposition to the rule laid down by Mr. Sergeant *Williams*. In that case which was an action against the *indorser* of a bill of exchange, the declaration, though complete in other respects, alleged

money, on a certain future day, on condition that B. shall, before that day, perform certain services for A.; it is clear, that unless B. performs the services, within the time named, he can have no right to recover the money; and it is equally clear, that the finding of the only other material facts in the case, viz. the making of the promise, and the non-payment of the money, neither raises, nor even conduces, to raise, any legal presumption of the performance of the *services*.

A DEFAULT cures no defect in the declaration, which would not have been aided, on a *general demurrer*. (a) For no fact can be presumed to have been proved, when no trial has been had, and no proof exhibited. And therefore a motion in arrest of judgment, for the insufficiency of the declaration, *after a default*, operates precisely as a general demurrer to the declaration would have operated.

THIS PRINCIPLE EXTENDS TO ALL PLEADINGS.—The same principle, which renders radical defects, in a *declaration*, incurable by verdict, extends to all stages of the pleadings, on either side. And therefore, if the defendant's *plea* discloses no legal defence; a verdict in his favor will not make the plea good. And judgment may be arrested, (the declaration being sufficient) on the *plaintiff's* motion. (b)

FAULTS IN THE ISSUE.—It often happens, that when the

neither a *demand* on the acceptor, nor *notice* to the defendant, of the dishonor of the bill. And after a *general verdict* for the plaintiff, judgment was arrested, by the court of King's Bench, who held *each* of the omissions, above mentioned fatal. The precise principle of this determination was, that as against the *indorser* of a bill, whose liability is only secondary and conditional, such demand and notice are *conditions precedent*; the performance of which, or either of which, cannot be presumed from the finding of the facts alleged in the declaration; because proof of all the latter facts does not, and cannot involve proof of such performance. *Vide* 2 New Rep. 239. 240.

(a) 2 Burr. 900; 1 Saund. 228. a. b. c. (n. 1.); 2 Stra. 1271; 1 Wils. 171; 10 East, 364.

(b) 3 Black. Com. 395.

pleadings are otherwise perfect, judgment is arrested, after verdict, for some radical fault in the issue. In cases of this kind, in which the same principle governs, as in all the foregoing examples, the general rule is, that if the issue is *immaterial*, so that the court cannot discover, from the finding upon it, for which party judgment ought to be given; the judgment must be arrested. (c) Thus, if in an action against husband and wife, for a wrong committed by *her* alone, they plead that *they*, are not guilty, and the verdict is for them; the judgment must be arrested. (d) For the verdict determines nothing, from which the court can discover how judgment ought to be given; since the matter, put in issue, is not that, which the declaration charges, the complaint being, not that the *defendants* are guilty of the wrong; but only that the *wife* is so; and the verdict does not show whether *she* is, or is not guilty, but only that *both* defendants are not so. Thus also, if in assumpsit against an executor, on a promise, alleged to have been made by his *testator*, the defendant pleads that *he* did not promise; a verdict in his favor, on this plea, cannot avail him; and judgment will be arrested, (if the declaration be sufficient) on the *plaintiff's* motion. (e)

Whenever, then, one of the parties, *passing by what is material* in the adverse pleading, tenders an issue upon a point which is *not so*, and obtains a verdict, the judgment must, regularly, be arrested. (f) Thus, if the declaration and plea in bar are both good, and the plaintiff traverses an *immaterial* part of the plea, and obtains a verdict; judgment

(c) Com. Dig. *Pleader*, R. 18; 2 Saund. 319. a. b. (n. 6.); 1 Ib. 228. a. b. (n. 1.); 1 Lev. 32; Carth. 371; Bac. Abr. *Pleas*, &c. M. 6 Mod. 1.; 2 Salk. 579; Ld. Ray. 707, 922; [See opinion in *Garland v. Davis*, 4 How. (U. S.) 131].

(d) Cro. Jac. 5; Lawes' Pl. 176; Bac. Abr. *Pleas*, &c. M.

(e) 3 Black. Com. 395; 2 Vent. 196.

(f) 3 Black. Com. 395; 1 Saund. 228. a. b. (n. 1.); 2 Ib. 319, a. b. (n. 6.); Com. Dig. *Pleader*, R. 18; Bac. Abr. *Pleas*, &c. M. Cro. Jac. 434; 2 Burr. 944; 1 Ib. 302; 2 Stra. 994.

must, according to the general rule, be arrested. And generally in such cases, (i. e. where the only fault is in *the issue*), the court, on arresting the judgment, will award a *repleader*, in order that a better issue may be framed.(g)

Such is the usual course, whenever the *verdict* does not show for whom judgment ought to be rendered; or in other words, when the matter of fact, found by it, is *immaterial*, or *not decisive* of the right in controversy(h); though in some cases of this kind, as will hereafter appear, a *repleader* is refused, and final judgment rendered, according to the legal merits of the case, as they appear from *the pleadings*, and without reference to the *verdict*.

An issue, as is stated elsewhere is sometimes so framed, that a verdict upon it, on *one* side, is decisive of the merits of the cause, when a finding *the other way* would not be so.

(g) Id. As the plea in bar, in the case here supposed, is a sufficient answer to the declaration; and as the substance of the plea stands confessed, by not being traversed; the question can hardly fail to suggest itself—why should not the court, instead of awarding a *repleader*, give judgment directly for the defendant, who appears—though not from the *verdict*, yet from the *whole record*—entitled to it, the verdict notwithstanding? For the verdict decides nothing against him; and the pleadings show, confessedly, sufficient matter in bar of the action. And the same question must naturally present itself, whenever a *repleader* is awarded, after verdict, for the immateriality of the issue. The true answer to this inquiry appears to be, that the awarding of a *repleader*, in such a case, was originally rather an act of *indulgence* to the party who tendered an improper issue, than a matter of *strict right*: an indulgence, grounded on the presumption, that the issue was misjoined through the *inadvertence and oversight* of the pleaders; and that a further opportunity to plead would probably result in a *material* issue, decisive of the merits of the cause. And this indulgence may have been deemed the more reasonable, inasmuch as the traverse, though faulty, is found to be *true*; and also as the party, to whom it was tendered, has, by joining in it, *concurred in occasioning a useless trial*, which he might have prevented, by demurring to the traverse.

(h) Gilb. H. C. P. 147; 1 Lev. 32; 2 Saund. 319. a (n. 6.).

In such cases, the general rule of the common law is, that when the finding is thus *decisive* of the merits, it cures the issue; but that when it is not *thus* decisive, the judgment must be arrested, and a *repleader* awarded. (i) But, by the statute 32, H. 8, c. 30, such issues are now, in general, as *negatives pregnant*, aided by a verdict *either* way. Yet an issue, *strictly* immaterial, (i. e. including *nothing material*. so that *no* verdict upon it, for either party, can decide the merits of the controversey), remains incurable, as at common law. (j)

A REPLEADER, for the immateriality of the issue, is never awarded, it seems, for that party who *tendered* the issue. (k) And therefore, if the verdict is *against him*; judgment must also regularly go against him. For as the fault in the issue commenced on *his* part—his traverse being bad in law; and it being, moreover, found to be false in fact; it is deemed unreasonable to grant him the indulgence of a repleader. Yet, if the verdict were *for* the same party; a repleader would, regularly, be awarded, on the grounds stated in the foregoing sections, and in the last preceding note.

By the *common* law, the same diversity prevails, as to the awarding or refusal of a repleader, when the verdict is founded on an issue, including both what is *material*, and what is *not so*—in other words, when the traverse, on which the issue was joined, is a *negative pregnant*; in which case, if the verdict is *for* the party tendering the traverse, the judgment must, by the common law, be arrested, and a repleader

(i) 2 Saund. 317, 319. a. (n. 6.); Cro. Jac. 550; 2 Lev. 11.

(j) Carth. 371; 2 Mod. 137; Saund. 319. a. (n. 6.); Cro. Jac. 434, 585; 1 Saund. 228. (n. 1.). [*Quick v. Miller*, 103 Pa. 67; *State for use of Crumbacker v. Seabright*, 15 W. Va. 590, 595, and cases cited; *Smith v. Townsend*, 21 W. Va. 486, 495].

(k) Doug. 396, 747, 749; Com. Dig. *Pleader*, R. 18; 1 Saund. 308; 2 Ib. 319, b. (n. 6.); Tidd. 824; 1 H. Black. 644; 1 Ld. Ray. 170; 8 Mod. 174.

awarded; though if the verdict were *against* him, judgment would pass against him.(1)

The reason of this diversity, in regard to the effect of the verdict, when the issue is joined on a *negative pregnant*, has been already suggested: viz. that when a verdict is found on such an issue, and the *only* fault, in the pleading, is in the issue, the finding, if against the party tendering the issue, will generally, and I trust, universally, show that judgment ought to go against him; although a verdict *for* him would determine nothing material to the merits of the cause.

Thus, as elsewhere stated, if to a plea, that the plaintiff has released the cause of action, *since the date of the writ*, he traverses that he has released 'since the date of the writ'—thus making *the time*, which is immaterial, parcel of the issue; a verdict for *the defendant* would be plainly decisive in his favor, and entitle him to judgment: whereas, a finding for the *plaintiff*—the party who *tendered* the traverse—would as plainly be indecisive; as being consistent with the supposable fact of a release, *before* the date of the writ. For the verdict ascertains nothing more, than that the alleged release was not made *after* the date of the writ—leaving the question, whether there was any release given at any time, undetermined. And therefore, according to the principles of the common law, the judgment must, in the case last supposed, be arrested, and a *repleader* awarded; though under the before mentioned statute, 32 H. 8, c. 30, the issue; in this case also, is now made good by the verdict, and the party, *tendering* the traverse, entitled to judgment.

So also, if in debt or assumpsit, the defendant pleads a tender, on a certain day; and the replication denies that such tender was made *on that day*, (a denial, which is a mere *negative pregnant*); a verdict for the *defendant* would entitle him to judgment; while a finding for the *plaintiff*, who

(1) Co. Litt. 126, a. 303, a; Gilb. H. C. P.147; 2 Saund. 319 (n. 6.); 1 Burr. 302.

tendered the issue, would not show for whom judgment ought to be given. And therefore in this, as in the last preceding case, the judgment must, according to the principles of the *common law*, be arrested, and a *repleader* awarded. And this diversity, between the effect of a verdict for, and one against, the party, tendering the issue on a *negative pregnant*, will be found to exist, in every example of such an issue, heretofore given in this treatise, and probably to *all* issues of the same kind.(m)

COURT WILL NOT ACT USELESSLY.—The last foregoing rules and examples, are intended to explain the object, and the effect, of motions in arrest of judgment, when the *only* substantial defect in the pleadings is in *the issue*, on which the verdict has been found. But the effect of such motions may be varied essentially from those stated in the foregoing sections, by radical defects in the pleadings, which *precede* the issue, and which would render a *repleader*, or arrest of judgment, nugatory. For courts ought never to award a *repleader*, or to arrest judgment, for faults in the issue, when it is apparent, that *no useful end* can be attained by so doing.(n)

(m) Though issues joined on *negatives pregnant*, are regularly aided, under the before mentioned statute, 32 H. 8, c. 30, by a verdict, *either way*, yet this is not universally the case. In one instance at least, an issue of this kind, if found *for* the party tendering it, is *not* aided by the statute. The instance referred to, is that of debt on an obligation payable on, or *before*, a particular day (as the 30th of January), and a plea of payment before the day, as on the 10th of the same January: In which case, if the plaintiff replies only, that the defendant did not pay 'on the 10th of January,' and the jury find for the *plaintiff*; the finding is immaterial, and a *repleader* must still be awarded—though a verdict for the *defendant* would have been decisive, and have entitled him to judgment, (2 Stra. 994; 3 Black. Com. 395; 2 Burr. 944; 1 Ib. 301-2; Com. R. 148.) Now, though the issue, tendered in this case, appears clearly to be only a *negative pregnant*, it is nevertheless not cured, under the above statute, by a verdict for the plaintiff, for a reason, peculiar to this particular case, and which has been heretofore stated.

(n) 1 Stra. 397, Com. Dig *Pleader*, R. 18.

And therefore, if it is apparent to the court from the whole record, that *no manner* of joining issue could avail the party against whom the verdict is found—or in other words, that *no issue, which could be tendered* upon the MATTER of his pleading, as it is alleged, or in any form, in which it could be alleged, would be a *material* issue; a repleader cannot legally be awarded, nor judgment arrested, at *his* instance, for any fault in the issue joined. (o) Thus, if the declaration is good—the plea in bar *totally* void of substance—and issue joined on any part, or the whole of the plea, and verdict is for the *plaintiff*; he is entitled to judgment—the immateriality of the matter of the issue notwithstanding. For in such a case, it would be plainly nugatory to award a repleader; since *no possible* issue, tendered upon such a plea, or upon the *matter* of it, in whatever manner alleged, could decide the merits of the cause. And it would be as plainly improper, to arrest the judgment, inasmuch as the plaintiff appears, from the whole record, clearly entitled to it. (p)

If, in trespass, for example, the defendant pleads, as a justification, matter, which *however* stated, could not amount to a justification in law, and on a traverse of the plea, the verdict is for the *plaintiff*; the latter is immediately entitled to judgment. (q) For, upon the grounds last mentioned, a *repleader* would be nugatory; and as the whole record shows a right of recovery, in the plaintiff; it would be unjust to arrest the judgment.

If however, the matter of the plea, in the case last supposed, had been *substantially a good* justification in law, but so inaccurately alleged, as to render the traverse of it immaterial, and the verdict, as before supposed, for the

(o) 1 Burr. 301; Cowp. 510; Bac. Abr. *Pleas*, &c M; Com. Dig. *Pleader*, R. 18; 1 Stra. 394, 397, 398; 1 Salk. 173; 4 Burr. 2143, 2146.

(p) 1 Stra. 394, 397, 398; 1 Salk. 173; 2 Pick. 614.

(q) 1 Stra. 398; 1 Burr. 302.

plaintiff; judgment must have been arrested, and a repleader awarded(*r*): because, in the case, as now stated, it would appear from the record, that a *good* issue might be formed, upon the matter of the plea, when *properly pleaded*; and when this is the case, the ends of justice require that an opportunity, for forming such an issue, should be afforded.

JUDGMENT ARRESTED WHERE DEFECTIVE PLEADING SUFFICIENT IN SUBSTANCE.—It is, therefore, a general rule, that whenever the matter of the pleading, on which the issue has been joined, is sufficient *in substance*, but so incorrectly pleaded, as to render the issue and finding indecisive, and the verdict is *for* the party tendering the issue, the judgment must be arrested and a repleader awarded(*s*); it being deemed reasonable, that after verdict, such mere *inaccuracies* should be corrected.

In conformity to this principle is the following case:—To debt on bond, the defendant pleaded usury—counting upon the statute of usury, ‘made of the *sixth* of Feb.’ 13 Eliz. (whereas the statute was actually passed on the *second* of Feb.) The plaintiff replied, that the obligation was not made for usury, &c. ‘*against the form of the statute in manner and form aforesaid.*’ This issue was found for the *defendant*; but, as statutes of usury are, in their nature, *public* acts; the court knew judicially, that no such statute existed, as that pleaded by the defendant; and therefore held the finding to be clearly incorrect, and nugatory. But as the ground of the defence, (usury), was in substance sufficient in law; and as the issue and finding were faulty, only in consequence of an *inaccuracy in the mode of pleading* that defence; the court refused to give judgment for the plaintiff, as the case stood, and awarded a *repleader*.(*t*) For it was apparent, that the matter of the defence *might* be so pleaded,

(*r*) *Id.*

(*s*) *Cro. Eliz.* 245; 1 *Burr.* 302.

(*t*) *Id.*

as to form the subject of a *good issue* (u): whereas, when the pleading, on which the issue is joined, contains *no substance*, or none which could, in any form of statement, avail the pleader, the awarding of a *repleader would*, as has been before shown, be altogether useless: since no manner of pleading the same matter could form the subject of a *material issue*; nor would it be possible, in such a case, to lay the foundation of *such* an issue, unless the pleader were allowed, on pleading anew, to abandon the whole matter, first pleaded by him, and to allege a new and distinct ground of demand, or defence—which can never be allowed, as it would be, in effect, allowing a *departure*.

In some cases, the greatest defects *in the issue* are not a sufficient ground for arresting judgment, after verdict. For if there be a radical defect, in any of the *previous* stages of the pleadings, and if the *first* defect, of this kind, is on the part of *him who moves* in arrest of judgment; the motion cannot prevail: since in every such case, it must be apparent, from the whole record, that judgment ought to pass against him. Thus, if an immaterial issue is joined upon a *good replication*, and found for the *defendant*; still if the *declaration* is radically defective, the defendant is entitle to judgment. For it would be useless to arrest the judgment, at the plaintiff's instance; since he could, by no possibility, be entitled to judgment upon such a declaration.(v)

And although the particular *part* of the pleadings, on which the issue is joined, be *good*, and the issue and finding be on a material point; yet if there exists a radical fault,

(u) In this case, the verdict was, indeed, against the party tendering the issue; but as it was judicially known to the court, and appeared, necessarily, from the record, that the finding was legally *untrue*; the determination was the same, as if the verdict had been for him, who tendered the issue—the plaintiff.

(v) 1 Ld. Ray. 170; Hob. 56, 19; 2009 8 Co. 120, b. [See *Sparhawk v. Hall*, 52 Vt. 624].

(and that the first), in the previous pleading of him, *for* whom the verdict is found; judgment must, regularly, upon the foregoing principles, be arrested. (*w*) Thus, if to a declaration, *defective in substance*, the defendant pleads a substantial defence, (as a *release* of the action), and upon a traverse of the plea, the verdict is for the *plaintiff*; judgment must be arrested. For there appears, upon the whole record, to be no right of action.

And whenever the merits of a motion in arrest of judgment depend upon the sufficiency of any of the *previous* pleadings, the governing principle appears to be, that judgment ought never to be given for, or arrested in behalf of, that party, in whose pleading the *first* substantial defect is found.

JUDGMENT NON OBSTANTE VEREDICTO.—In some cases, where the party, who has obtained a verdict, is not entitled to judgment upon it, the court not only arrest judgment *in pursuance* of the verdict; but immediately render judgment in chief, *veredicto non obstante*—i. e. in favor of the party, *against whom* the verdict has been found. But this, it seems, is done only in *very clear cases*, where there can be no doubt, that the party, against whom the issue is found, is, upon the whole record, entitled to judgment. (*x*) This is done, for example, where a plea in bar, *confessing* a good declaration, is clearly *frivolous*, or so *totally destitute* of substance, as to constitute no semblance of a legal defence: in which case, (the right of recovery being confessed), to withhold from the plaintiff a judgment in chief, would be a virtual denial of justice. The judgment, in such cases, however, is given as upon *confession*, (the right of action being,

(*w*) *Id.*

(*x*) 6 Mod. 2; 1 Ld. Ray. 641; 1 Stra. 394; Cro. Eliz. 214; 8 Taunt. 413; 1 Chitt. Pl. 634; Yelv. 24. (n. 1.); Hob. 56 (n. 4.) *Williams'* ed.; 3 B. & A. 710; 4 Ib. 564; 8 Mass. 261; 5 Pick. 187. [*Lough v. Thornton*, 17 Minn. 253].

in law, *confessed by the plea*), without regard to *the verdict*(y) as the latter decides nothing, either way.

THE AWARDING OF A REPLEADER, when it ought to be refused, or the refusal of it, when it ought to be awarded, is *error*(z): as the mistake must be to the prejudice of one, or the other, of the parties.(a)

COSTS.—When judgment is arrested for any insufficiency in the issue, or other part of the pleadings, no *costs* are allowed to either party(b)—not to the party, on whose motion the judgment has been arrested; because he might have taken advantage of the insufficiency of his adversary's pleading, in an earlier stage of the proceedings, by *demurring*, and thus have prevented the delay, and expense of a trial—not to him *against* whom the motion has prevailed; because, having no merits, he cannot be entitled to recover any thing.

REPLEADER—WHEN AWARDED.—A repleader can properly be awarded, only after an *issue in fact* (joined and tried)(c) the main object of awarding it, being, as we have seen, to enable the parties to substitute a good *issue*, for a bad one. It seems, however, that before the statutes of *jeofails*, repladers were awarded, as well before as after the trial of the issue; because, in general, defects in the issue could not at common law, be cured by verdict. But now a

(y) *Id.* [*Plano Mfg. Co. v. Richards*, 86 Minn. 94; *Collier v. Jenks*, 19 R. I. 493.

The motion for this judgment relies on the record and reaches nothing *dehors* it. *Stearn v. Clifford*, 62 Vt. 92].

(z) 6 Mod. 2; 2 Saund. 319, b. (n. 6); 2 Salk. 579; 1 Day. 27, 152; 1 Chitt. Pr. 633.

(a) In N. Y. under the Code, we have no *repleader*; as *all corrections* of the pleadings are made on motion; are called *amendments*; and may be made at almost *any* stage of the proceedings. See AMENDMENTS.

(b) 2 Salk. 579; 6 Mod. 2; Com. Dig. *Pleader*, R. 18; 2 Vent. 196; 1 T. R. 267; 1 Stra. 617; Cowp. 407; 1 Chitt. Pl. 639.

(c) 3 Salk. 306; 2 Saund. 319. b. (n. 6.) 2 Salk. 579; Bac. Abr. *Pleas*, &c., M. 1, 3; Com. Dig. *Pleader*, R. 18; 6 Mod. 3, 102; Carth. 371.

repleader is, regularly, not awarded, until the issue has been *tried*(*d*); because, under those statutes, a verdict may possibly *cure* the fault in the issue, and thus supersede the necessity of repleading; and this point the court will not, generally, decide by *anticipation*; but will await the finding of the jury.

A repleader cannot be awarded, after a demurrer.(*e*) For by the demurrer, the parties have put themselves upon the judgment of the court: and as the demurrer reaches back, through the whole record; the issue in law, raised by it, cannot, in the nature of the thing, be *immaterial or indecisive*, as an issue in fact may be. And on similar grounds, a repleader cannot be awarded, after a *writ of error*.(*f*)

Again—no repleader can be awarded, after a *default or discontinuance*(*g*); not only because there is, in such case, no *issue tried*, but also because the default, or discontinuance, is a *waiver* of all further pleading, as well as an abandonment of all that may have been before pleaded, by the party defaulted, or discontinuing.

The regular course, on a repleader awarded, is, for the pleadings to recommence, at that stage, at which the *first* deviation from good pleading occurred, or rather, at the *first fault*, which *occasioned* the immateriality of the issue.(*h*)

If therefore, the only substantial fault is in the *traverse*, which tendered the immaterial issue; the pleading is to commence *de novo*, from that point, by the tender of a new

(*d*) *Id.*

(*e*) Poph. 42; Sav. 89; Latch, 148; 3 Salk. 306; 6 Mod. 102; 2 Saund. 319. b. (n. 6.); Com. Dig. *Pleader*, R. 18; 5 Co. 52; Bac. Abr. *Pleas*, &c. M. 3; 2 Lev. 12; 1 Chitt. Pl. 634;—3 Lev. 20, 440, *cont.*

(*f*) *Id.*

(*g*) Bac. Abr. *Pleas*, &c. M. 3; 6 Mod. 3; Com. Dig. *Pleader*, R. 18; 2 Salk. 579; Comb. 323; 2 Saund. 319, b. (n. 6.); 1 Chitt. Pl. 633.

(*h*) 1 Ld. Ray. 169; Com. Dig. *Pleader*, R. 18; 2 Saund. 319, b. (n. 6.); 6 Mod. 2; 2 Salk. 579; T. Ray. 458; 1 Burr. 301, 302; 3 Black. Com. 395.

traverse.(i) But if the pleading, on which the issue was first tendered,—whether it be the declaration, plea in bar, replication, or other part of the pleading—be, (although good in substance), so incorrectly framed, as to render the issue, tendered upon it, immaterial; the replading must begin, at the *same* stage or part of the pleadings—in order that it may be so corerected, as to furnish the subject of a material issue.(j)

But though the *immediate object* of replading is only to produce a good *issue*; yet, as the award of a replader is in *general terms*—‘*quod partes replacitent*’; either party, it seems, may avail himself of this general award, for the purpose of correcting all *mere inaccuracies*, in any part of his previous pleading,—though not for the purpose of alleging any *new and distinct ground* of demand, or defence.(k)

ARREST OF JUDGMENT FOR FAULTS IN VERDICT.—Judgment is sometimes arrested, when the pleadings are good, for faults in the *verdict*.(l)

IF THE VERDICT VARIES SUBSTANTIALLY from the issue, (as if, instead of finding the matter in issue, either way, the jury find something *foreign* to it); judgment must be arrested—because the finding does not ascertain the matter of fact in issue, and cannot therefore show, for which party judgment ought to be given.(m)

IF VERDICT FINDS PART OF ISSUE.—The rule is the same, when the verdict finds only *part* of the matter in issue—

(i) Id.; 2 Vent. 196; 2 Stra. 994.

(j) Id.

(k) 1 Ld. Ray. 169; Com. Dig. *Pleader*, R. 18; 2 Salk. 579.

(l) Bac. Abr. *Verdict*, M. [See *contra*, *Potter v. McCormick*, 127 Ind. 439; *State v. Snow*, 74 Me. 354; *Fuller v. Chamberlain*, 11 Me. 503.

In Massachusetts there can be no motion in arrest of judgment for a cause occurring before the verdict unless such cause affects the jurisdiction of the court. *Dean v. Ross*, 178 Mass. 397].

(m) 2 Roll. Abr. 707, 719; Bac. Abr. *Verdict*, O.; 2 Vent. 151.

omitting to find, either way, another *material* part.(n) For it is the duty of the jury to ascertain, and that of the court to give judgment upon, *all* the material facts, put in issue by the pleadings. But a verdict, finding the whole *substance* of the issue is good—although it be silent, as to what is *immaterial*(o): since the latter cannot affect the merits of the controversy.

MORE THAN ISSUE.—A verdict, finding the whole issue, or the substance of it, is not vitiated, by finding *more*.(p) For the finding of what was not in issue, is but *surplusage*; and *utile per inutile non vitiatur*.

VERDICT ON DECLARATION GOOD IN PART ONLY.—In general, where one count in a declaration is good, and another substantially ill, if the *jury*, upon a plea to the whole declaration, or upon a default, find a general verdict for the plaintiff, with *entire* damages, (i. e. without *discriminating* in the assessment of the damages, between the different counts); the defendant may arrest the judgment; or if judgment is given, in pursuance of the verdict, may reverse it by writ of error.(q) For it is impossible for the court, judging, as it must, from the record alone, to discover, on which count the damages were assessed, or what proportion of them have been assessed on the one, or the other; and the jury, as the law presumes, are as likely to have assessed them, on a bad count, as on a good one.(r)

(n) Cro. Eliz. 133; Andr. 156; Bac. Abr. *Verdict*, M.; 3 Leon. 82; 2 Stra. 1089.

(o) Co. Litt. 227. a.

(p) Reg. Pl. 219; 6 Co. 46; Bac. Abr. *Verdict*, N.; 6 Mass. 304.

(q) 1 T. R. 151, 508, 532; 3 Ib. 435; 2 Saund. 171. b. (n. 1.); Bac. Abr. *Damages*, D. 3; Cro. Eliz. 329; Bull. N. P. 8; 2 H. Black. 318; Doug. 731; 1 Caines 347; 2 Mass. 53, 408; 5 Greenleaf, 446; 9 Pick. 547. [*Mercantile Trust Co. v. Hensey*, 27 App. D. C. 210; *B. & O. S. W. Ry. Co. v. Alsop*, 176 Ill. 471. And see, *C. & E. I. R. R. Co. v. Snedeker*, 122 Ill. App. 262.]

(r) In *Grant v. Astle*. (Doug. 730), Lord Mansfield expressed his disapprobation of this rule, as being 'inconvenient and illfounded;'

The above rule, however, applies only to *civil* actions. If therefore, an *indictment* contains several counts, of which one is good, and the others ill; the court, on a general verdict of 'guilty,' will award the punishment, on the *good* counts only.^(s) But this rule is, in no degree, inconsistent with the principle of that which prevails, in civil suits. For, in criminal cases, no *damages* are assessed; nor is it the province of the jury to decide upon the *punishment*, incurred by the offence. This is to be determined, exclusively by the *court*; whose proper duty it is, to judge of the sufficiency of the several counts, and to give sentence against the prisoner, upon that, or those, only, which they find to be sufficient in law.

In *civil* cases also, where the declaration contains a good and a bad count, and a general verdict is found for the plaintiff, with *entire damages*; if it appears, from the notes of the judge, before whom the trial was had, that *no* part of the evidence, exhibited to the jury, applied to the bad count; the verdict may be *amended*, by order of the court, so as to apply to the good count only: after which amendment, the

and the courts of several of the United States have rejected it. (2 Conn. 324, 338; [*Hoag v. Hatch*, 23 Conn. 585; *Waugh v. Waugh*, 47 Ind. 580; *Gilmore v. Ward*, 22 Ind. App. 106]. 2 Bay. 204, 439. 1 Hen. & Munt. 361.) Yet, no rule appears to be more clearly warranted, by the original principles of law, than this. For the judgment of the court, which is only an inference of law, from the facts ascertained upon the record, must always be formed from the *face of the record itself, and from that alone*. And as the jurors are, and must be, presumed to know nothing of the sufficiency or insufficiency of counts; the conclusion seems perfectly just, in legal theory, that the damages are as likely to have been assessed, in part, or in whole, upon a bad count, as upon a good one. In regard to the alleged practical *inconvenience* of the rule, courts, not bound by it, are doubtless at liberty to judge for themselves; but material deviations from well established principles of the common law, are in general—to say the least—of very questionable expediency.

(s) 2 Burr. 985; Doug. 730; 1 Bos. & P. 186-7; 1 Salk. 384; 2 Ld. Ray. 886; 1 Johns. 322.

court will give judgment, (in pursuance of the verdict), for the plaintiff, on that count only.(*t*) For, as the verdict stands, after the amendment, and before judgment is given, it appears from the face of the record itself, that the damages were assessed only on the good count.

If the jury assess damages *separately*, upon each of the counts, where some are good, and others ill; the court will arrest the judgment on the bad counts only; and give judgment for the plaintiff, for the damages assessed on those which are good.(*u*) For in this case, the record will distinctly show, to *what part* of the damages assessed, the plaintiff is by law entitled, and to what part of them he has no legal claim; and the court is thus enabled to distinguish between them, in giving judgment.

SPECIAL VERDICT FINDING EVIDENCE.—If, in a *special* verdict, the jury find only the *evidence* of a material fact, instead of the fact itself, or otherwise omit to find, upon such a fact, either way; no judgment can be rendered upon the finding, for either party: since a matter of fact, essential to the determination of the cause, is left unascertained by the verdict.(*v*) Thus, if in trover, on the general issue pleaded, the jury return a special verdict, finding the property in the goods to be in the plaintiff—the loss of them, by him—the finding of them, by the defendant—and the *refusal of the latter to restore them, on the plaintiff's demand*—without showing any fact, either amounting to a conversion, or disproving it; the court can render no judgment upon the verdict.(*w*) For the *conversion*, which is the gist of the

(*t*) Doug. 376; 1 Saund. 171. b. (n. 1.); 1 Bos. & P. 329; 7 Mass. 358; 2 Johns. Cas. 18—*Vide* 1 H. Black. 78; 6 Taunt. 67. [*Peabody v. Kinsley*. 40 N. H. 418]

(*u*) 3 T. R. 433, 435; Stra. 189, 808; 4 Burr. 2022. *Vide* 6 Taunt. 629.

(*v*) 10 Co. 56-7; 3 Burr. 1243; 1 East, 111; Esp. Dig. 590.

(*w*) *Id.*

action, is neither found, nor denied, by it; the demand and refusal being only *prima facie evidence* of a conversion.

VENIRE DE NOVO TO BE AWARDED.—In all the foregoing cases, in which judgment is arrested for defects in *the verdict*, a *venire de novo*, must be awarded—i. e. another jury must be summoned, to try the same issue(*x*); but no *repleader* is awarded in such a case—the fault being, not in the *pleading*, but in the verdict.

(*x*) Bac. Abr. *Verdict*, M.; Doug. 377-8; 10 Co. 118, 119; 2 Stra. 1052-3; 6 T. R. 691.

PART III.

OF PLEADING.

DIVISION I.

NATURE OF PLEADING.

DEFINITION.—PLEADINGS are the mutual altercation of the parties to a suit, expressed in legal form, and in civil action reduced to writing. (a) In a more limited sense, however, 'the pleadings' (in the *plural*) comprehend only those allegations, or altercations, which are *subsequent* to the count, or declaration. (b)

HISTORICAL STATEMENT.—In England, these altercations were anciently *oral*; having been offered, *viva voce*, by the respective parties or their counsel, in open court; (c) as is still, generally done, in the pleadings on the part of the defendant, or prisoner in *criminal* prosecutions. And hence it is, that in the *Norman* language, in which most of the an-

(a) Com. Dig. *Pleader*, A.; 3 Black. Com. 293.

(b) Com. Dig. *Pleader*, A.; Reg. Pl. 2, 54; Lawes' Pl. 1.

(c) [It was not until the time of Edward I (13 Edw. I, ch. 10) that a general permission was given to sue and defend by attorney. It is well ascertained that during the time of Henry II. parties were obliged to appear personally after which the suit might be conducted by attorney. Actual and personal appearance in open court was requisite. The statements, in presence of the judges, by which the court was informed of the nature of the controversy were called *loquela*.

cient books of the English law are written, the pleadings are frequently denominated the *parol* (*d*): more recently the term *parol* has been used to denote the entire pleadings in a cause: as when in an action, brought against an *infant heir*, on an obligation of his ancestor's, he prays that the *parol may demur*; i. e. that the pleadings may be stayed, till he shall attain full age. (*e*) Though for centuries past, all pleadings, in civil actions, have been required to be *written*. (*f*)

There was oral pleading in England in the reign of Henry III, and it is believed that it was not abandoned until about the middle of the fourteenth century.

In many of the States no formal pleadings or formal issues are required in justices' courts. See, for example, *White v. Emblem*, 43 W. Va. 819. Oral pleadings are allowed in justices' courts in New York. N. Y. C. C. P. § 2940.

In *Michels v. West*, 109 Ill. App. 418, a case brought before a justice of the peace, it was held that if there were no written pleadings in a case the rules of law governing the substantial oral pleadings would be the same as if the pleadings were in writing.]

(*d*) Ibid. Lawes' Pl. App. 80-4; Bac. Abr. *Amendment*, &c., A.

(*e*) 3 Black. Com. 300; *Plasket v. Beeby*, 4 East, 485.

(*f*) [It has been held that if written pleadings are omitted the objection is cured by going to trial without objection, the statute of amendments and jeoffails covering such cases, and even if the statute did not cure the defect the consent of the parties would. *Kelsey v. Lamb*, 21 Ill. 550. So in *Vider v. City of Chicago*, 60 Ill. App. 595, it was held that there was no law compelling parties to prepare and file pleadings if they were content to have their case presented and heard without written statement, though the court acknowledged that the informality was startling.

In *Gwin v. Williams*, 27 Miss. 324, 333, no formal plea was drawn up and signed by the defendant or his counsel. The record showed that the defendant appeared and pleaded the general issue. The court said that as there was no statute of that State requiring pleas to be written, the court (in their discretion) might allow the parties to make up their issues on the record, the essential thing being that the issue appear on the record. The objection would be that, in such a case, it might not be full, distinct, and certain, but this would not apply to the plea of the general issue.

Under rules of court in some States pleadings cannot be dispensed with by consent. *Hicks v. Marshall*, 67 Ga. 713.

PLEADINGS IN CIVIL ACTIONS.—The mutual altercations, which constitute the pleadings in civil actions, consist of those formal allegations and denials, which are offered, on one side, for the purpose of maintaining the suit, and on the other, for the purpose of defeating it(*g*); and which, generally speaking, are predicated only of matters of *fact*.

For pleading is, practically nothing more than affirming or denying, in a formal and orderly manner, those facts, which constitute the ground of the plaintiff's demand, and of the defendant's defence (*h*) Pleading, therefore, consists

Under the codes the judgment must have a written statement of the cause of action to support it. *Young v. Rosenbaum*, 39 Cal. 654; *Becket v. Cuenin*, 15 Col. 281, 285. The New York C. C. P. requires that a pleading shall be signed by the attorney for the party. § 520. The object aimed at by this requirement is certainty. Thus in *Parrish v. Sun Publishing Ass'n*, 6 App. Div. 585, 588, the court, discussing a question as to the right to open and close, said: "The question should have been determined upon the pleadings as they stood, and not upon admissions or oral withdrawals made *in medias res* for the purpose of suddenly shifting the affirmative and thus securing the advantage of the last word to the jury. Such admissions usually result, as they did here, in leaving their full and exact scope in a state of uncertainty. The rights of the parties should be determined upon precise and well-formulated issues settled before they come to trial, and not upon a mere colloquy from which the trial judge must, on the spur of the moment, glean, as best he may, the legal effect of what is said and of what is, perhaps, adroitly left unsaid."

An omission in a written pleading may be supplied by an admission in open court. *The Merchants' & Mnfrs. Bk. v. Montinger*, 49 Ia. 249].

(*g*) [*Burnham v. Ross*, 47 Me. 456, 459.]

(*h*) Bacon's Abr., *Pleas, &c., Introd.*; *Read v. Brookman*, 3 T. R. 150, 159, per Buller, J. [And see *Chattanooga Cotton Oil Co. v. Shamblin*, 101 Tenn. 263; *Dyett v. Pendleton*, 8 Cow. 727.]

This definition is equally applicable to pleadings under the Codes. And for this reason, said the court, in *Paxton v. State*, 59 Neb. 460, pleadings are receivable in evidence in other suits as declarations or admissions against interest.

Pleadings are to be regarded as the foundation of the proof to be submitted on the trial. *Taylor v. Coppock*, (Pa.) 1 Del. Co. Rep. 190.

The purpose of pleading is to definitely present the issues to be tried and to determine between them. *Tucker v. United States*, 151

merely in alleging matter of *fact*, or in denying what is alleged as such by the adverse party.

PLEADING AS A SCIENCE.—But in the theory, or *science* of pleading, the averment of facts, on either side, always presupposes some principle, or rule of *law*, applicable to the facts alleged; and which when taken in connection with those facts, is claimed, by the party pleading them to operate in his own favor. For all rights of action, and all special defences, result from matter of fact and matter of law combined. And hence, in every declaration, and in all special pleading, some *legal* proposition (i. e. some proposition consisting of matter of *law*), though not in general *expressed* in terms, by the pleader, (because the court is supposed judicially to know it,) is always, and necessarily, *implied*, or—to use the language of grammarians—*understood*.

For it would be obviously to no purpose, for either party to state facts, of which no principle of *law* could be predicated in his favor. Indeed, all that a party submits to the *court*, by alleging facts, is their *legal* operation: and for the purpose of deciding what their operation in law is, the rule of law, in virtue of which the pleader claims the matter of fact alleged by himself, to be in his favor, must always be *tacitly supplied*, or understood.

By contemplating the subject in this point of view, we are enabled to apprehend the striking propriety and full import of Lord Mansfield's remark, that 'the substantial rules of pleading are founded in strong sense, and the soundest and closest *logic*.'⁽ⁱ⁾ For those rules, when considered in their proper connexions and dependencies, will be found to in-

U. S. 164, 168. And see *Bowman v. McLaughlin*, 45 Miss. 461, 489. Or, in other words, the purpose of pleading is to inform the opposite party in advance of the trial upon what the party interposing it relies, either to establish the cause of action alleged, or to defeat the cause of action asserted by the opposite party. *Blum v. Bruggemann*, 68 N. Y. Suppl. 1065.]

(i) 1 Burr. 319.

volve a connected, methodized body of **PRINCIPLES**, constituting a complete and coherent system of *legal logic*: a system, artificial indeed in its form and structure; but admirably adapted to the important ends of *simplicity, uniformity and certainty*, in the modes of administering justice.

A LOGICAL PROCESS.—For the purpose of explaining and illustrating this view of the subject, we may observe, that all pleading is essentially a *logical process*. And by analyzing a good declaration, or any good special pleading, if we take into view, with what is expressed, what is necessarily supposed or implied; we shall find in it the elements of a good *sylllogism*: all good pleading being in substance a *sylllogistic* process; though abridged in form, like some of the *sylllogisms* of the schools. So that not only every good declaration, but all good special pleading on either side, in each successive stage of the pleadings, is essentially a good *sylllogism*.

Thus in an action, brought for a trespass committed upon land, the declaration may be presented in the following form: 'Against him, who has forcibly entered upon my land, I have a right by law, to recover damages: The defendant has forcibly entered upon my land: Therefore, against him I have a right, by law, to recover damages.' In the example here given, the first or major proposition asserts the *legal* principle, on which the plaintiff founds his claim: The second, or minor, alleges the matter of *fact*, to which that principle is to be applied, in the particular case: The conclusion is the legal inference, resulting from the law and fact *together*, as they appear in the premises. And the judgment of the court, (if for the plaintiff,) is a *re-affirmance of this conclusion(j)* together with an award, or sentence of *recovery* in pursuance of it.

In the case now stated, the plaintiff's alleged right of recovery may be contested, by a denial of either of the three

(j) 3 Black. Com. 396.

propositions, which constitute his declaration. And as the denial of either of them is, in effect, a complete denial of the plaintiff's whole claim, the defendant is not allowed, (by the rules of the common law,) to deny more than one of them. For if he can successfully deny any one of them; he will, by so doing, attain every object, which he could have proposed in denying them all.

If, then, the defendant would deny the major, or first proposition above stated, which consists of matter of *law*, he must do it, by tendering what is called an *issue in law*—which is merely a technical denial of some *legal* proposition, or supposed rule of law. The minor or second proposition in the declaration—as it consists only of matter of *fact*—must be denied, if at all, by what the law denominates an *issue in fact*; or, more strictly speaking, by *tendering* an *issue in fact*—which is the legal mode of denying by plea, what has been alleged, as matter of fact, on the other side. (*k*) But assuming the major to be correct in principle, and the minor true in point of fact, (upon which supposition neither of them can be successfully denied); the conclusion must inevitably follow, unless the defendant can repel it, by alleging some *new* matter, (i. e. some distinct collateral fact) which is inconsistent with it, and which therefore *by consequence* implies a denial of it: there being no form of *direct negation*, in which the conclusion can be distinctly answered.

Let it be supposed, then, that in the case just stated by way of example, the plaintiff's premises are both undeniable; but that he has released his cause of action to the defendant, and that the release is the particular fact, or new matter, upon which the defendant relies, for defeating the suit. Under these circumstances, the defendant's plea, or defence, if reduced to a syllogistic form, will stand thus: "If he, upon whose land I have forcibly entered, releases to me his right of action for such entry; he has thenceforth no right by law

(*k*) 3 Black. Com. 396.

to recover damages for it, against me. But the plaintiff has released to me his right of action, for my entry upon his land. Therefore he has, by law, no right to recover damages for that cause, against me." (1)

To this defence the plaintiff has now, in his turn, a right to reply, by denying either of the three propositions, advanced by the defendant. But if he admits both of the defendant's premises; or if, as we are now assuming, he cannot successfully deny either of them; his suit must of course fail, unless he can destroy the defendant's *conclusion*, by some new matter of fact which will be, in legal effect, a denial of it.

For the purpose then of carrying this process one stage further, let us suppose that the release, pleaded by the defendant, was extorted from the plaintiff by *duress*; and that this fact is the *new* matter, by which the plaintiff proposes to overthrow the defendant's conclusion. The plaintiff's reply may, upon this state of facts, be resolved into the following syllogism:—"A release extorted from me, by *duress*, does not in law destroy any pre-existing right of mine, to recover damages: But the release, pleaded by the defendant, was extorted from me by *duress*: Therefore, that release does not destroy my right by law to recover damages against him."

It is now necessary for the defendant, if he persists in

(1) Noting these last two sections, let the pleader, in any given case, make up his own mind, whether to deny the major, or the minor, premiss; i. e., whether to tender an issue on the *fact*, or on the *law*. He will thus *analyze* the whole declaration (complaint), and, understanding it, will be able to answer it understandingly. And, if he elect to deny the minor premiss, he will deny *those facts* which have a legal operation;—and *those only*. If he is to set up new matter, he will aver only such as, itself, has a legal operation. And there is no danger that he, who can rightly read his opponent's syllogism: and can construct an answering syllogism out of his own side of the case; will ever make any other than a *clear* and *simple* answer. He will *know* what he wishes to say; and he will *say* it.

denying the plaintiff's claim, to contest this reply; and this he may do, by denying either of the three propositions, of which it consists. But assuming, as in the preceding stages of this illustration, that neither of the *premises* can be safely denied, the consequence must be, that the plaintiff will prevail unless the defendant can, on his part, allege some further new matter, which may destroy the plaintiff's *conclusion*. And the pleading of such new matter, of whatever facts it may consist, will contain the elements of another syllogism—which the plaintiff will be at liberty to answer, by another still; and the same syllogistic process may be repeated, by the parties, alternately as long as there remains new matter to be alleged on either side.

For, that both parties may respectively have the full benefit of pleading whatever the nature and exigencies of the case, on their respective sides, may require, it is obvious that each must be at liberty to answer the allegations made against himself, by denying, at his election, *either* of the three propositions contained in those allegations. In other words, each party must be at liberty to deny whatever he considers as false, either in law, fact or inference, in his adversary's pleading. Each party, therefore, has a right to allege *new* matter, in any stage of the pleadings, as long as he has occasion to answer new matter—i. e. as long as *such* matter is alleged against him. And thus the right of *electing* between the three regular modes of meeting his adversary's allegations, is continued to each party, until one of the *premises* in the pleading on one side, is directly denied on the other; or (to substitute legal, for scholastic language,) until the pleadings terminate in the tender of a proper *issue*, in law or in fact. (*m*)

(*m*) [*An issue*, then, is a single, certain, material point (*Richardson v. Smith*, 80 Md. 94; *infra*. See page 187.), and arises when a fact or a conclusion of law is maintained by one party and is con-

PLEADINGS ARE TERMINATED BY THE ISSUE.—An *issue*, of either kind, precludes the allegation of further new matter on either side and thus regularly closes the pleadings.(n) For before any issue can be tendered, both parties will necessarily have an opportunity to allege whatever the nature of the case, on either side, may require. And as the whole controversy, which is the subject-matter of the pleadings, is by the issue, reduced to some one point of fact or law; no necessary or useful purpose can be attained, by carrying the plead-

troverted by the other. (*Leach v. Pearce*, 93 Cal. 614, 619, construing Cal. Code Civ. Proc., § 588; N. Y. C. C. P. 963.)

An issue being a single point arising out of the pleadings, cannot be formed by a mere parol denial by one party of an allegation of the other, nor partly in writing and partly by parol. What issues are formed on the record is a question for the court. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476, 488. An issue must be made by the pleadings before a jury is impaneled to try the cause. *White v. Emblem*, 48 W. Va. 819; *Ruffner v. Hill*, 21 W. Va. 152.

An *issue of law* arises upon a demurrer (*Schumacher v. Mahlberg*, 96 Mo. App. 598), and a determination of such issue is a trial after which plaintiff cannot have a voluntary nonsuit (*Hume v. Woodruff*, 26 Oreg. 373).

An *issue of fact*, according to N. Y. C. C. P., § 964, arises,

1. Upon a denial, contained in the answer, of a material allegation of the complaint; or upon an allegation, contained in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint.

2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer.

3. Upon a material allegation of new matter, contained in the answer, not requiring a reply; unless an issue of law is joined thereupon.

4. Upon a material allegation of new matter, contained in the reply; unless an issue of law is joined thereupon.

The denial of any material allegation constitutes an issue of fact. *Hatch v. Thompson*, 67 Conn. 74.

An "*issue in fact*" is not necessarily the same thing as an "issue of fact." *Bias v. Vickers*, 27 W. Va. 456. And an issue is to be distinguished from a particular question of fact which may be submitted to a jury for a special finding. *Gale v. Priddy*, 66 Ohio St. 400].

(n) Co. Litt. 126 a.; 3 Black. Com. 314.

ings further. For the question, upon which the contest depends, is now distinctly presented by the issue, and ripe for determination. And it only remains for the court, or the jury, to decide the point in issue, and for the former to render judgment. If the issue be taken upon matter of *law*, it is to be determined by the court—if upon matter of *fact*, it is in general, though not universally, to be tried by the jury: it being the province of the former to decide questions of *law*, and of the latter, ordinarily, to ascertain matters of *fact*.(o) And the issue, whether in law or fact, being decided, the judgment of the court, which is merely the sentence of the law(p), deduced from the facts ascertained, must follow in favor of that party who appears, from the whole record, entitled to it.

THE OBJECT OF PLEADING.—From this very general outline, it will be apparent that all pleading is a *logical* process. And the great object of the process is to facilitate the administration of justice, by simplifying the grounds of controversy, and ultimately narrowing down the contest to a single and direct affirmative and negative—i. e. to some definite point of law or fact, affirmed one side, and denied on the other.(q)

(o) 3 Black. Com. 315.

(p) Ib. 396.

(q) [The "object of the process" is no different under the code. *People v. Ryder*, 12 N. Y. 433.

In Connecticut the "statutes formerly gave the defendant the right to plead, by special leave of the court, as many several matters by distinct pleas as he should think necessary for his defense. * * * This provision was expressly repealed by the Practice Act. * * * Had it been retained in force, one of the main purposes of the new system of pleading would have been frustrated. The Practice Act distinctly abandoned the professed aim of the common law to bring every legal controversy to an issue upon some single, certain and material point. *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 560. Instead of this, it was provided that no issue need be joined on a demurrer, and that the denial of any material allegation should constitute an issue of fact. The object

By SPECIAL PLEADING, is meant the allegation of *special* or *new* matter, as distinguished from a direct *denial* of matter previously alleged on the opposite side.

The matter of *fact*, which, in the preceding illustration, constitutes the subject of the minor proposition, is, in the established forms of pleading, always expressly alleged: since the *facts*, upon which the complaint or defence is founded, are supposed to be unknown to the judges. The conclusion, or third proposition, in the syllogistic process, is also expressed, in the existing mode of pleading, either by the *demand*, which the plaintiff makes of damages, debt, or other thing, on the one hand, or by defendant's *prayer of judgment* against the plaintiff, on the other. For it cannot appear, from facts stated *alone*, what benefit the pleader proposes to claim from them; and he can, therefore, derive from them no advantage which he does not claim from them, in his pleading. (r)

But as has been already suggested, the *principle*, or rule of *law*, of which we have represented the major proposition to consist, (and which, according to ancient usage, was, in certain cases always recited, or formally alleged by the pleader), is now, in general, not actually *expressed* in the pleadings, in any form. For the judges, whose province it

of the change was, in large part, to secure from the pleader admissions of the truth of whatever he knew to be true or (having knowledge or information sufficient to form a belief) did not believe to be untrue, in the material allegations of the adverse party." *Green-thal v. Lincoln, Seyms & Co.*, 67 Conn. 372, 377, per Baldwin, J.]

(r) The principles, stated in this section, are the basis of the decision under the New York Code (*Drake v. Cockroft*, 10 How. Pr. Rep. 377), that an answer which, without denying any *fact* stated in the complaint, merely says that 'the defendant denies that the plaintiff is entitled to the sum of money demanded in this action, or any part thereof,'—will be struck out on motion; and judgment will be rendered for the plaintiff, if such be the only answer. This is because the *premises* of the complaint not being denied, the *conclusion* is a necessary legal inference: and the denial being of *that* is a bare, legal falsehood,—to be struck out as *sham*.

is to decide upon the legal sufficiency of all pleadings, are presumed to *know judicially*, what the law, upon any given or alleged state of facts, is. And the nature of the *facts*, actually alleged on either side, taken in connexion with the *demand* laid in the declaration, and with the *prayer of judgment*, in the subsequent pleadings, will, in every case, and with perfect certainty, indicate the supposed rule of law upon which the pleader relies, as his major proposition. And in this manner, that proposition, though not expressed in terms, is necessarily understood and tacitly supplied.

Thus, in the example already given, of a declaration in trespass, the plaintiff, in alleging that the defendant has forcibly entered upon his land, and demanding damages for that cause, assumes and tacitly asserts the general principle, that he, upon whose land such an entry has been made, has a right by law to recover damages against him who made it. For unless that principle of law were tacitly supplied, or presupposed, the averment of the defendant's entry, and the demand of damages, which follows it in the declaration, would be altogether unmeaning and nugatory: since no right of action could result from the defendant's act, if no such legal principle existed.—And this principle, or the proposition which would express it, is as clearly indicated by the matter of fact alleged, and the demand made in the declaration, and may therefore be as easily apprehended and applied, as if it had been expressly and formally stated.

The object, thus far proposed, has been to exhibit a general analysis of the law of pleading, considered as a *science*, or *system of principles*. And though the scholastic terms and forms, which have been introduced for this purpose, are unknown in the established language and practice of pleading; yet the essential properties and the results of the preceding syllogistic process, though differently expressed, are in effect the same as those of the less scholastic modes of pleading, adopted by the common law.

Thus, an issue in law which, in the foregoing analysis is called a *denial of the major proposition* of the adverse party, is described in legal language, as an *admission of the facts* alleged by that party, but a *denial of their legal operation* in his favor. These different terms however express, in effect, one and the same thing—or rather, the operation thus differently described, is essentially one and the same.

Thus also, the *new*, or *special* matter, which in the foregoing analysis is called a denial of the adverse party's *conclusion*, is, in legal language, denominated matter of *avoidance*—i. e. matter which, admitting both of the other party's premises, avoids or repels, in the particular case in question, the *consequence*, or *inference*, which would otherwise result from them. And that inference is, universally, the *sylogistic* conclusion in the adverse party's pleading, if his pleading be reduced to a syllogism. It is therefore manifest, that matter of *avoidance*, and matter which, in the sylogistic formula, goes in denial of the adverse party's *conclusion*, are in substance one and the same thing.

IN CONCLUDING this introductory chapter, it may be proper to observe, that the forms of scholastic logic, employed in the preceding pages, have been introduced for the purpose of resolving the law of pleading into its constituent principles: a process which has been deemed conducive to a correct and systematic exhibition of the original and essential nature of all pleading. And as those forms are more simple, and exact, than any other mode of analysis, of which the subject would admit; they have been, of course, thought better adapted than any other to the end proposed.

DIVISION II.

RULES APPLICABLE TO PLEADINGS IN GENERAL

CHAPTER I.

THE MAJOR REQUISITES OF PLEADING.

TWO CARDINAL RULES.—There are two indispensable requisities to all good pleading:

- 1, That the *matter* pleaded (i. e. the *facts* alleged,) be sufficient in law to avail the party who pleads it; and
- 2, That it be deduced and alleged, according to the *forms of law*.

And if either of these requisites be omitted, the pleading is ill.(a) For all pleading is required to be sufficient,

(a) Hob. 164; Bac. Abr. *Pleas, &c.*, Introduction; Cowp. 683.

[PLEADING IN THE CODE STATES.—The rules of pleading at common law have not been abrogated by the codes. The essential principles still remain. The object still is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty. *Parsley Co. v. Nicholson*, 65 N. C. 207. And see, *Sampson v. Shaeffer*, 3 Cal. 196. And see, *Doll v. Smith*, 43 Misc. 417, where it was said that the object of certain sections of the code (§§ 537, 538, 545, 870 *et seq.*) was to make the issue plain to the court and to expedite the trial.

The object of the code provisions is to enable the court to give judgment according to the facts stated and proved without reference to the form used, or the legal conclusion adopted by the pleader. *Wright v. Hooker*, 10 N. Y. 59. So if a complaint contains an ample statement of facts constituting a cause of action on contract, and such allegations are clearly supported by evidence, the plaintiff is

of introducing and detailing the subject-matter pleaded, which have been established by usage, and which cannot be not only in substance, but in *form* also: by which latter term, we are here to understand those technical or artificial *modes*

entitled to judgment though the complaint contains also the words "and have converted the same to their own use." *Connaughty v. Nichols*, 42 N. Y. 83 (followed in *Connor v. Philo*, 117 App. Div. 349; *Booth v. Englert*, 105 App. Div. 284). This ruling must not be misunderstood: it was merely a case of disregarding surplusage and not a change of the cause of action. If, in this case, the plaintiff had stated facts showing a cause of action *ex delicto*, he could not have amended, after introducing the same evidence, by inserting facts appropriate to a cause of action on contract, thus changing the character of the action. So in *Matthews v. Cady*, 61 N. Y. 652, the plaintiff sued to recover, on the ground of fraud, certain money paid for stock. No fraud was proved, but the plaintiff was allowed to recover damages for breach of contract. The Court of Appeals held this error as changing an action *ex delicto* to one *ex contractu*.

The codes allow but one form of civil action, and the same tribunal administers legal and equitable relief. But the distinction between law and equity still remains. As was said by Judge Hammond, "The Code abolishes all forms of action so far as to obliterate the technical distinctions between them, but still requires pleadings in courts of law to be in the form of declarations and pleas, and the form of petition and answer or bill and answer is not recognized in the statute nor used in practice. *Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 19 Fed. 273.

A COMPLAINT is sufficient if under the averments thereof the plaintiff is entitled to introduce the evidence necessary to establish his cause of action. *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 457; *Booz v. Cleveland School Furniture Co.*, 45 App. Div. 593. This is the general rule, but it must be interpreted reasonably. The court will not search through a hodge-podge of allegations jumbled together without order or relation to find the facts which the plaintiff must prove to sustain his suit. Even under the reformed procedure the want of essential allegations in the declaration cannot be supplied by remote implication or conjecture. The reason which impels the courts to the "exercise of ingenuity in bringing favorable implications and presumptions to the aid of the allegations of declarations and complaints after verdict or judgment, does not exist where a pleading is attacked upon demurrer." *Price v. Bouteiller*, 79 Conn. 255.

The remarks of Judge Ingraham of the Supreme Court of New

dispensed with, without impairing that *certainty, regularity* and *uniformity*, which are essential in all judicial proceedings. (b)

York, Appellate Division, First Department, are worthy of the most careful attention in this connection. In the case of *Phillips v. Sonora Copper Co.*, 90 App. Div. 140, after condemning the complaint as an "example of a method of pleading that has become too common," the learned Judge said: "Allegations are jumbled together bearing no relation to each other, uniting statements of fact with conclusions of fact and conclusions of law, without any relation to one distinct cause of action which is sought to be enforced, and then trying to sustain the complaint when its sufficiency is attacked by picking out independent allegations which have no particular relation to each other and claiming that a good cause of action is established because such allegations, if properly pleaded, would be a sufficient foundation for calling upon the defendants to answer. But in such a case we should at least have in some portion of the complaint a specific allegation of the facts which are necessary to sustain such a cause of action as the plaintiff claims he has alleged, and the complaint should not be sustained where it is impossible to pick out distinct statements of fact which, taken together, are sufficient to entitle the plaintiff to some relief."

FORMS OF PLEAS.—Formerly, whether a plea was a plea in abatement or in bar, or whether it was to the writ or to the jurisdiction of the court, was determined by the form of the plea, particularly by the conclusion, and not by the subject-matter. *Guild v. Richardson*, 6 Pick. 364. So is it still the case in States that have not adopted the code system that matter in abatement, as, for example, want of capacity to sue, if pleaded in bar will not be considered. *Russia Cement Co. v. Whitmarsh*, (R. I.) 67 Atl. 450. And see *Pitts Sons Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582. Now, matters pleaded in bar or in abatement are to be alleged in one answer, and may be tried together in the court's discretion. *Payne v. Payne*, 129 Wis. 450.

LEX FORI DECIDES QUESTIONS OF PLEADING regardless of the place of the cause of action. *Lyons v. Tex. & P. R. Co.*, 36 S. W. 1007.]

(b) This consideration may account, in a great measure, for the importance which courts of justice attach—and which they are, sometimes, charged with attaching, unnecessarily—to matters of mere *form*, in pleading.

The experience of all courts, under the Code, fully confirms the soundness of this reason for the rule. And the *want* of this very certainty, regularity and uniformity, is one great cause of our

EVERY SUBSTANTIVE FACT MUST BE ALLEGED.—It is regularly essential then to all good pleading, that the party, offering new matter, allege every *substantive* fact, which is necessary in *law* to the maintenance of his suit or defence. (c) For if any such fact be omitted, the claim or defence, as disclosed by the pleader, must of necessity be defective. (d)

WHAT ALREADY APPEARS NEED NOT BE AVERRED.—But that which already appears sufficiently, in the pleading of either party, without a formal allegation, need not be expressly averred. (e) For it would be obviously nugatory and absurd, to require a distinct and substantive averment of that which, by the supposition, already appears with sufficient certainty.

ILLUSTRATIONS.—a.—Thus, in pleading a covenant to *stand seized to uses*, (which is a species of conveyance founded only upon the consideration of *kindred* or *marriage*),

having the court calendars cumbered with causes, which, under the old rules of pleading, would have been *out of court, on the pleadings*: and that, not for matter of *form*; but because the attempt to state their facts, within the rules established for certainty, &c., would have shown the pleader that he had no standing in court.

(c) *Bac. Abr. Pleas, &c. A.*; *Com. Dig. Pleader, C. 76*; *Lawes' Pl. 46*. [*Corbin Oil Co. v. Searles*, 75 N. E. 293.]

The Code rule requiring a liberal construction of pleadings does not dispense with the necessity of pleading facts on showing which the pleader hopes to secure his object. *Overton v. Overton*, 131 Mo. 559.

A plea which is defective in its statement of facts cannot be aided by stipulation. *Gaston v. Modern Woodman of America*, 116 Ill. App. 291.]

(d) This section can be, and should be, as strictly followed under the Code, as at common law.

(e) *Co. Litt. 303*; *Yelv. 176, note*; 7 *Co. 40 b.*; 9 *Ib. 54. a. b.*; 11 *Ib. 25 a.*; 2 *N. Rep. 77*. [*Tweedy v. Jarvis*, 27 Conn. 42; *Guild v. Richardson*, 6 Pick. 364.]

So a party cannot plead something in contradiction of what the record shows in the same cause. The court will take notice of the contents of the record. Objection to such a plea may be taken by demurrer, and perhaps the plea may be treated as a nullity. *People v. Shaw*, 13 Ill. 581.

if it is expressly shown that the deed is from a father to his son, or other *near relative*, there is no need of averring distinctly that the conveyance was made in *consideration* of kindred. (f) For that such was the consideration, (there being no other alleged,) is apparent from the relationship, which is expressly stated. And upon the same principle it is, that though in trespass or trover, for the taking or conversion of goods, or specific chattels, the *value* of the property must regularly be alleged; yet if the action is brought for taking or converting *current money* (as one hundred dollars, current coin of the United States), it is unnecessary to make a distinct averment of its value (g): since that fully appears from the number of dollars stated.

b. Thus also, in an action upon a covenant for quiet enjoyment, (in which the eviction of the plaintiff must be shown to have been under *elder* title) if it *appears* clearly, from facts stated in the declaration, that the evictor's title is the elder, there is no need of formally and distinctly averring that it is so. (h)

FACTS NECESSARILY IMPLIED NEED NOT BE ALLEGED.— Upon a similar principle, circumstances, however material, if *necessarily implied* in any fact expressly stated, need not themselves be substantively alleged. (i) And therefore, if

(f) *Idem.*

(g) 11 Co. 54. b.

(h) 4 T. R. 617; 2 Lev. 37.

(i) Bac. Abr. *Pleas*, &c. I. 3; Co. Litt. 303, b.; 1 Salk. 91; 8 Co. 82, b.; 14 Pick. 212. [*Lord v. Russell*, 64 Conn. 86; *People v. Frost*, 32 Ill. App. 242; *Weaver v. Harlan*, 48 Mo. App. 319.

Thus, if it is alleged that the plaintiff was put out of possession, it will be implied that he was actually in possession. *Lee v. Stiles*, 21 Conn. 500. And from an allegation that the child killed was the infant son of the plaintiffs and under the age of two years, it may be inferred that he was unmarried. *Ozezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 212. A purchase of land implies an agreement that the vendor will do what is necessary to transfer the legal title. *Drum v. Stevens*, 94 Ind. 181. An allegation that "the

one pleads a feoffment, without expressly averring livery of seisin, this omission does not vitiate the pleading(*j*): since livery of seisin, being of the essence of every feoffment, a feoffment, *ex vi termini*, implies such livery. And therefore, to allege a feoffment, is by necessary implication to allege livery of seisin. Again: If the plaintiff in ejectment describes the land in question as lying in the parish of A, it is not necessary, in laying the *ouster*, to allege that it was *committed* in the same parish: for that fact sufficiently appears from the local description before given of the land.(*k*)

defendants bound themselves by writing under seal" implies delivery. *Jacobs v. Curtiss*, 67 Conn. 497. Delivery of a deed will be implied from an allegation of execution. *Thorp v. The Keokuk Coal Co.*, 48 N. Y. 253. Under a statutory provision that a written instrument is presumptive evidence of consideration a consideration will be implied from an averment of the execution of a contract in writing wherein the defendant promised, &c., *Henke v. Eureka Endowment Asso.*, 100 Cal. 429.

All facts that can be implied from the allegations by reasonable and fair intendment are traversable in the same manner as they would be if directly stated. *Few v. Wolfsohn*, 174 N. Y. 272; *Abbey v. Wheeler*, 170 N. Y. 122, 127; *Sage v. Culver*, 147 N. Y. 241, 245; *Case v. Carroll*, 35 N. Y. 385; *Zabriskie v. Smith*, 13 N. Y. 322; *Spies v. Michelsen*, 2 App. Div. 226.

WHAT IS PRESUMED BY LAW.—Nor is it necessary to allege what the law presumes, e. g., that a domestic judgment was obtained on proper procedure (*Fisher, Brown & Co v. Fielding*, 67 Conn. 91, 103); or that a "circuit court" of another State, whose judgment is set up in the petition, is a court of general jurisdiction (*Nicholas v. Farwell & Co.*, 24 Neb. 180).

But in pleading process of a court of limited jurisdiction every fact requisite to show that the court had acquired jurisdiction must be averred. *Clark v. Norton*, 6 Minn. 412. No presumption will be indulged in such a case except under statutory direction. See, *Bearns v. Gould*, 77 N. Y. 455; *Toby v. Ferguson*, 3 Oreg. 27].

(*j*) *Id*; 2 Saund. 305, n. 13; Com. Dig. *Pleader*, E. 9; Cro. Jac. 411; Cro. Eliz. 401.

(*k*) Com. Dig. *Pleader*, C. 20; Cro. Jac. 555, 557; 2 Mod. 304; 2 Black. 706.

This rule is acted on, under the Code, as it was before. 11 How. Pr. Rep. 216; 3 Duer, 691; 12 How. Pr. Rep. 460; 8 Ib. 385; 6 Barb.

- ALL FACTS ALLEGED IN GOOD PLEADING, CONSIST, either
- 1, Of the *gist* or *substance* of the complaint, or defence—or,
 - 2, Of matter of *inducement*, or as it is sometimes termed, *conveyance*—or,
 - 3, Of matter of *aggravation*.

Whatever else is *stated*, in any part of the pleadings, is but *surplusage*. For what is termed *form* in pleading, constitutes no distinct *matter*, but simply the *manner*, in which the matter pleaded is stated.

1. THE GIST of the complaint or defence is the *essential ground* or *principle* subject-matter of it; or that, without which no legal cause of complaint can appear, on the one hand, or no legal ground of defence, on the other; however perfect, in point of *form* the pleading may be. Of this nature is the *consideration* of the defendant's promise, in *assumpsit*—the performance of a *condition precedent*, in an action on a contract, containing such a condition—the *conversion* in *trover*, &c.

2. MATTER OF INDUCEMENT is that which is merely *introductory* to the essential ground or substance of the complaint, or defence—or in some respect *explanatory* of it, or of the manner in which it originated or took place.⁽¹⁾ Thus in

662; 4 Duer 362; 2 Sandf. 673.—For *discriminating*, as to averments which do *not* imply what is requisite, see 5 How. Pr. Rep. 5. 14 Ib. 297.

(1) [*In Henke v. Eureka Endowment Asso.*, 100 Cal. 429, plaintiff sued to recover a sum of money due under an endowment policy, executed by the defendant association in which plaintiff held a certificate of membership. On demurrer the court said :

"It is quite apparent from the complaint that the cause of action is based upon the written contract to pay, and that the allegations of membership by plaintiff in the defendant corporation, issuing to her an endowment certificate, and her right as a member to participate in the endowment fund, etc., are but inducements to the contract upon which she counts."

Where a default may constitute both a breach of contract and a

trover, the *loss* and *finding* of the plaintiff's goods(*m*)—and in an action for a nuisance to a house or land, the plaintiff's *possession* of the subject injured—are respectively matters of inducement.(*n*)

3. **MATTER OF AGGRAVATION** is that which, in actions for forcible injuries, is intended to show the circumstances of *enormity*, under which the principal wrong complained of was committed. Thus if the plaintiff, in trespass for breaking and entering his house, superadds to his statement of the breaking and entry, that the defendant at the same time made an affray, beat his servants, scattered his goods, and committed other enormities, these superadded facts are only matters of *aggravation*, which require neither proof nor answer: the breaking and entering of the house being alone the *gist of the action*(*o*)—and whatever sufficiently answers

tort, and the complaint contains apt allegations charging the default in both aspects, the complaint should be construed as in tort if it appears by the whole complaint that the contract is alleged chiefly or wholly by way of necessary inducements in order to show the existence of a duty, and the emphasis laid upon willful or wrongful disregard of this duty. *Boehrer v. Juergens & Anderson Co.*, (Wis.) 113 N. W. 655, per Winslow, J.]

(*m*) Bull. N. B. 33; Lawes' Pl. 66; 14 Pick. 165.

(*n*) Some of these matters of inducement are cut off by the Code; but others remain necessary. Is not our true rule, this?—where the inducement is but a *legal fiction*,—(as is, ordinarily, the allegation of loss and finding, in trover,)—it is not now required: While what is a *substantive fact*,—(as the plaintiff's possession, in a suit for nuisance,) must still be alleged. *Nellis v. De Forest*, 16 Barb. 61; *Bonner v. McPhail*, 31 Barb. 106.—Understanding this classification of averments, will at least enable the pleader to select, and retain, those which are essential.

(*o*) 3 Wils. 294; 3 T. R. 292; 1 H. Black. 555; Lawes' Pl. 70.

Allegations which merely operate in *aggravation* are immaterial, provided that sufficient is proved to establish some right, offense, or justification, included in the declaration, charge, or defense, specified on the record. *Regina v. Macpherson*, L. R. 3 P. C. 268; 39 L. J. C. P. 59; 11 Cox C. C. 604; 1 Taylor Ev. 8th ed. § 265.

these, is of course a sufficient answer to the whole complaint, including all matters of aggravation. (p)

The last observation is equally true of matter of *inducement*; which from its nature as already explained, does not in general admit of a distinct denial or precise answer of any kind. (q) For any sufficient answer to the *material* facts, alleged in the pleading of the adverse party, covers all that he has alleged—including as well matter of inducement as matter of aggravation.

SURPLUSAGE is that which is *impertinent* or entirely *superfluous*, as not being necessary either to the substance or the form of pleading. (r)

FACTS ONLY TO BE ALLEGED.—It is regularly necessary in pleading to state nothing except *facts*, and as the case may be, *conclusions* from them (s); or in any other words, nothing except facts as they really exist, or are, by legal fiction or presumption, deemed to exist. It is of course unnecessary, generally speaking, to allege matter of law. (t) For the judges

(p) *Id.*; Lawes' Pl. 70; 1 Wms. Notes to Saund. 24; 8 Cush. 337.

(q) Lawes' Pl. 118; Bull. N. P. 33.

(r) Com. Dig. *Pleader*, C. 28, 29, E. 12; Lawes' Pl. 63; [*Bradley v. Reynolds*, 61 Conn. 278. This distinction is clearly brought out in *Consolidated Coal Co. v. Peers*, 97 Ill. App. 188, 194. See *infra*.]

(s) Doug. 159, 278; Lawes' Pl. 46.

(t) *Id.*; 8 Co. 155.

[It is sufficient to allege facts from which a legal conclusion may be drawn. *Lesser v. Steindler*, 110 App. Div. 262. For example, if facts are alleged from which it appears that a legal duty devolved on the defendant, no further allegation of duty is necessary. *Martin v. Sherwood*, 74 Conn. 475.

The pleading will be judged by the facts alleged and not by the pleader's conclusions. *Quick v. Taylor*, 113 Ind. 540. Therefore it is not sufficient to allege a mere conclusion of law. For example, an allegation of duty is of no avail, and is immaterial, unless from the rest of the complaint the facts necessary to raise the duty can be collected. *McCune v. Norwich City Gas Co.*, 30 Conn. 521; *Atwood v. Welton*, 57 Conn. 514, 522; *City of Buffalo v. Holloway*, 7 N. Y. 493.

It is alleging a conclusion of law to aver that a cause of action set up in an amended declaration is the same as in the original declara-

are always presumed—as has been suggested in a former chapter—to know judicially what the *law* is; and have

tion. *Fisk v. Farwell*, 160 Ill. 236. So where one sues for money due as a commission on goods sold a reply that the plaintiff sold no goods and was entitled to no commissions amounts to a conclusion. *Brown v. Empire Typesetting Machine Co.*, 44 App. Div. 598. So it is merely stating a conclusion to allege that a bond was not regularly issued and was not legal (*Treat v. Richardson*, 47 Conn. 582), or to allege that a statute is unconstitutional by negating the constitutional formalities prescribed (*Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 394), that an assessment on stock was void (*Johnson v. Kirby*, 65 Cal. 482), that a list of party candidates was illegally certified (*Bowens v. Smith*, 111 Mo. 45), that a judgment was informal, irregular and void (*Naddo v. Bardon*, 47 Fed. 782; *Ritchie v. McMullen*, 159 U. S. 235), or that an attachment was illegal, unauthorized and void (*Sprague v. Parsons*, 14 Abb. N. C. 320), or that the court was without jurisdiction to render the judgment sued on (*Ritchie v. Carpenter*, 2 Wash. St. 512).

Fraud is a conclusion: the facts upon which the charge rests must be set out. *Abraham v. Gray*, 14 Ark. 301; *Bradley v. Reynolds*, 61 Conn. 271; *Sammis v. Wightman*, 31 Fla. 10; *Weigan v. Cannon*, 118 Ill. App. 635; *Stephens v. City Council*, (Iowa) 107 N. W. 614; *Leavenworth L. & G. Co. v. Douglas County Com'rs.*, 18 Kan. 169; *Newman v. Mercantile Trust Co.*, 189 Mo. 423; *Nichols v. Stevens*, 123 Mo. 96; *Smith v. Irvin*, 45 Misc. 262; *Steinberg v. Saltzman*, (Wis.) 110 N. W. 198; *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100; *Williamson v. Beardsley*, 137 Fed. 407.

The same is true of a charge of duress (*McPeck's Heirs v. Graham's Heirs*, 49 S. E. 175), and of a charge that a contract was secured by undue influence (*Barber Asphalt Paving Co. v. Field*, 188 Mo. 182.)

So it is alleging a mere conclusion to aver that a draft of a contract and subsequent letters constituted a binding contract (*Nester v. Diamond Watch Co.*, 143 Fed. 72), or that a duty and obligation existed under a contract (*Milligan v. Keyser*, 42 So. 367), or that the defendant "refuses to carry out the terms of his agreement" (*Armstrong v. Heide*, 47 Misc. 609), or that a tender of money discharged a mortgage lien (*Harris v. Staples*, Tex. Civ. App., 89 S. W. 801), or that the defendant received the money involved in the suit in trust for certain purposes (*Francis v. Gisborn*, Utah, 83 Pac. 571), or that a deed was never lawfully delivered (*Blake v. Ogden*, 223 Ill. 204), or that one is "an innocent purchaser" (*Wing v. Harden*, 73 Ky. 276), or that property was "duly exempted from taxation" (*McTiggan v. Hunter*, 19 R. I. 68), or that the defend-

therefore no occasion to be informed of it by the pleadings. (u)

ant had been released from liability on the instrument sued upon (*Maness v. Henry*, 96 Ala. 454); or that petitioner is next of kin of the person for whom the committee is asked (*Stephani v. Stephani*, 75 Hun 188), or that the defendant is "indebted" to the plaintiff (*Cooper v. McKee*, 28 Ky. L. Rep. 270; *Nealis v. Marks*, 96 N. Y. Suppl. 740; *Moore v. Hobbs*, 79 N. C. 535), that a deed was without consideration (*Roush v. Vanceburg, S. L. T. & M. Turnpike Co.*, 27 Ky. L. Rep. 542), or that the consideration of a note has wholly failed (*Mitchell v. Stinson*, 80 Ind. 324), or that a use is reasonable or proper (*Kellogg v. City of New Britain*, 62 Conn. 232, 240), or that the defendant is "legally chargeable" (*Conn. Hospital v. Brookfield*, 69 Conn. 1), or that the plaintiff is entitled to the possession of land and to the rents and profits thereof (*Sheridan v. Jackson*, 72 N. Y. 170).

In an action for damages for personal injuries if the defendant claims that the defendant owed him any duty the facts showing the duty must be set out. *Pittsburgh, C. C. & P. L. R. Co. v. Peck*, 165 Ind. 537; *North Birmingham R. Co. v. Liddicott*, 99 Ala. 545 (where the plaintiff alleged that he was getting on the car "as a passenger as he had a right to do.")

Under the codes the plea of *nil debet*, the old general issue in the

(u) COURTS JUDICIALLY KNOW the rules of the common law (*Rush v. Landers*, 107 La. Ann. 549; *Stokes v. Macken*, 62 Barb. 145; *Cooper v. Cooper*, 13 App. Cas. 88), including those of the law merchant, which is a part of the common law (*Reed v. Wilson*, 41 N. J. L. 29), and of general international law (*The Paquette Habana*, 175 U. S. 677), and treaties (*Strothers v. Lewis*, 12 Pet. 410, 438; *Ex parte McCabe*, 46 Fed. 263). But the law of England, since the Declaration of Independence, is the law of a foreign country, not a part of the common law, and must be pleaded. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445.

Courts will notice the unwritten law and public statutes of their own State. *Gaylor's Appeal*, 43 Conn. 82; *Vance v. Rankin*, 194 Ill. 625; *Ervin v. State*, 150 Ind. 332; *Graham v. Harford County*, 87 Md. 321. But municipal ordinances must be proved. *Friedstedt v. Dietrich*, 84 Ill. App. 604. And so must the law, written or unwritten, of a sister State (*Hendryx v. Evans*, 120 Ia. 310, 319; *Ward & Co. v. Morrison*, 25 Vt. 593, 602; *App v. App*, 106 Va. 253), or of a foreign country (*Wickersham v. Johnston*, 104 Cal. 407, 411; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445).

Acts of Congress are a part of the law of the forum and need not

EXCEPTIONS—1.—ACTIONS EX DELICTO AGAINST CARRIERS.—In some few instances, however, it was formerly

action of debt, is insufficient. *Taylor v. Purcell*, 60 Ark. 606; *McConoughey v. Jackson*, 101 Cal. 265; *Gale v. James*, 11 Col. 540; *Swanholm v. Reeser*, 2 Idaho 1167; *Metzger v. Carr*, 79 Hun 258; *Hoffman v. Richter*, 27 N. Y. Suppl. 935; *Grayson v. Harris*, 37 S. C. 606.

The remedy for this fault is to demur (*Kellogg v. City of New Britain*, 62 Conn. 232, where the city alleged that the use of a stream for a sewer was reasonable, natural and proper; *Kilgore v. Ferguson*, 77 Ill. 213; *Gum Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, where a complaint asking that the collection of a judgment be enjoined alleged that the affidavit on which the attachment was based stated no grounds for attachment; *Lynch v. Forbes*, 161 Mass. 302; *Leland v. Goodfellow*, 84 Mich. 357; *Day v. Duckworth*, 40 N. Y. Suppl. 378, where the plaintiff charged that the defendant had "embezzled"; *Chicot County v. Sherwood*, 148 U. S. 529); or, as in New York, to move that the pleader be required to make his pleading more definite and certain.

Upon demurrer, conclusions of law are not admitted. A demurrer admits the truth of allegations of facts, not of opinions of the pleader. *Eliot's Appeal*, 74 Conn. 587; *John D. Park & Sons Co. v. National*

be proved in any State. *K. C. M. & B. R. Co. v. Hippo*, 138 Ala. 487; *Benner v. Atl. Dredging Co.*, 134 N. Y. 156; *Gardner v. The Collector*, 6 Wall. 499.

Federal Courts, in the exercise of original jurisdiction, require no proof of the law of the jurisdiction. *Lamar v. Micou*, 114 U. S. 118. And see *Gormley v. Bunyan*, 138 U. S. 623. And when the Supreme Court of the United States sits as an appellate court to review a judgment of a lower Federal court, it takes judicial notice of the laws of every State of the Union. The rule may be different when the Supreme Court is reviewing the judgment of a State court, for "whatever was matter of law in the court appealed from is matter of law" in the Supreme Court, and whatever was matter of fact in the former is also matter of fact in the latter. *Hanley v. Donoghue*, 116 U. S. 1, 6-7.

Facts of which the court will take judicial notice need not be pleaded. *French v. State Senate*, 146 Cal. 604, 69 L. R. A. 556; *People ex rel. Drake v. Mahaney*, 13 Mich. 481.

For a very full statement of matters of which courts will take judicial notice, see *Olive v. State*, (Ala.) 4 L. R. A., and note by Robert Desty.]

thought necessary, and was therefore customary, in declaring, to state the *law* as well as the facts upon which the action was founded. Such was the practice in declaring in actions *ex delicto*, against *common carriers* for goods lost or damaged by their negligence or breach of trust: and in similar actions against *innkeepers*, for the effects of their

Wholesale Druggists' Asso., 175 N. Y. 1. In *Petty v. Emery*, 96 App. Div. 35, at p. 39, the court said :

"In *Knapp v. City of Brooklyn* (97 N. Y. 520), where the injury was alleged to have been caused 'by reason of the illegal action, frauds and irregularities of the officers,' etc., of the defendant, Judge Finch (at p. 523) says : 'No actions of such officers are pointed out as illegal; no frauds are described or averred; no irregularities are specified; and so no facts are pleaded upon which issue can be taken, or which indicate to the court or the adversary the questions intended to be tried.' The allegations in this complaint that 'defendant has arbitrarily and wrongfully manipulated the affairs of said company so that the said shares have not been placed in the hands of C. H. DeWitt & Company for delivery to the holder of said interim certificate, and has denied and disputed the right and title of said Willis B. Dowd and his assigns to said 250 shares of stock therein mentioned,' are not allegations of facts, but the averment of conclusions of law. In *Phinney v. Phinney* (17 How. Pr. 197) the allegations that the defendant has 'taken upon himself the exclusive management of the estate,' and with the 'connivance and consent' of another has 'Greatly mismanaged it' to the damage of the plaintiffs, were held to be conclusions of law. In *Taylor v. Atlantic Mutual Ins. Co.* (2 Bosw. 106), where it was alleged that the defendants had wrongfully made use of the slip, Mr. Justice Bosworth says (at p. 116) : 'The allegation that it was wrongful, and in violation of the plaintiffs' rights, is not an allegation of a fact, but is the pleader's view of the nature of the acts which he describes.' (See, also, *New York & Mount Vernon Transportation Co. v. Tyroler*, 25 App. Div. 161; *Van Schaick v. Winne*, 16 Barb. 89.) In the case before me not a single fact is alleged from which the court can infer that the defendant's acts were wrongful, or that he has violated the trust alleged.'

"Upon demurrer the conclusions of law are not admitted. As none of the facts upon which the conclusions are based are stated, the demurrer, upon the ground that the complaint does not state sufficient facts to constitute a cause of action, is sustained]".

guests, when lost or injured *infra hospitium*.(v) In both of which cases, the plaintiff, according to the ancient form of pleading, recited in his declaration the custom of the realm. i. e. the rule of law, in virtue of which he claimed a recovery.(w) But the 'custom of the realm' being in all cases, no other than the *common* or *general unwritten* law of the realm, there was never, on principle, any need of reciting it. And of late that practice, has in a great measure fallen into disuse(x): though in actions sounding in tort against innkeepers, it appears still to be usually, though unnecessarily followed.(y)

2. ACTIONS ON BILLS OF EXCHANGE.—In the same manner, it was formerly usual in declarations on *bills of exchange*, to recite the *custom of merchants* (i. e. the rule of mercantile law) upon which the action was founded.(z) But in this instance also, as in the two former, such a recital was upon the *principles* of pleading, clearly unnecessary. Since the 'custom of merchants,' or which is the same thing—the law-merchant, is a branch of the *common* laws.(a) In the modern precedents, therefore, the *recital* of the custom is in general omitted.(b) And even the practice which still prevails (c) of *counting* upon the custom (i. e. of making an

(v) Hob. 18; 3 Mod. 227; 1 Wils. 281; 2 Chitt. Pl. 273; Bac. Abr. *Carriers*, A. Id., Inns, C. 6. (n.)

(w) 1 Sid. 245; Com. Dig: *Action on case*, for neg., C. 2; Bac. Abr. *Inns*. C. 6; 3 Co. 32 a.; F. N. B. 94.

In some few other instances, also, the same mode of pleading formerly prevailed. (Vide 1 Lill. Ent. 67, 68, 69, 80, 81.)

(x) 3 Wils. 429; 2 Chitt. Pl. 271-2, 274.

(y) 2 Chitt. Pl. 274.

(z) Pl. Assist. 40; Kyd on Bills. 177, 180; Chitt. on Bills, 184-5, 233-4.

(a) 1 Ld. Ray. 88, 175; 2 Ib. 1542; Carth. 288. [*Aslanian v. Dostumian*, 174 Mass. 328; *Ferris v. Saxton*, 4 N. J. L. 1; *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348.]

(b) Id. Pl. Assist. 80, 81, 241; Chitt. on Bills, 184, 234.

(c) Chitt. on Bills, 233-4; Pl. Assist. 241.

express *reference* to it in the declaration, without reciting it), appears for the same reason to be an unnecessary formality, and has been so adjudged. (d)

3. SHOWING APPLICATION OF FACTS.—In some instances, however, inferences of law are advanced in pleading, for the purpose of showing the intended *application of the facts* pleaded, or for the sake of mere form.—Thus in declaring on bills of exchange, after the statement of the *res gesta*, or material facts, the plaintiff adds, 'by means whereof, &c., the defendant became *liable*,' i. e. in law, 'to pay' &c. (e) It is also usual for the defendant, in a plea of justification—after stating the special matter which constitutes his defence—to accompany his confession of the facts alleged against him with a *prout ei bene licuit*; i. e. to aver that he did the acts complained of, 'as by law he well might.' (f) In this in-

(d) 1 Ld. Ray. 88, 175, 234; Carth. 83, 269; Chitt. on Bills 234 (n., c.)

These sections show that the *principles* of common-law pleading were quite sufficient to clear themselves of *unnecessary* matters of form; (see *McFaul v. Ramsey*, 20 How. 524-5;) and that a reform, which, in *accordance* with those principles, would abridge mere matters of *detail*, by allowing *general* averments, would be far better than a sweeping abolition of what ages had, in many respects, perfected. The latter course has imposed on the profession, and the courts, the labor of an almost entire *reconstruction* of pleadings.

(e) Chitt. on Bills, 235-244; Pl. Assist. 241.

[It is not always improper to state a conclusion of law. For example, it is helpful to set out the construction of the contract relied upon. *Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507, 513. The presence in a pleading of a conclusion of law does not vitiate the pleading if there is also a sufficient statement of facts to exhibit the transaction and the grounds of liability. *Williamson v. Wager*, 90 App. Div. 186; citing Bliss on Code Pleading, § 213. The pleading is not to be rejected because it states the correct legal conclusion. *Jones v. Dow*, 137 Mass. 119. And if sufficient facts are stated to entitle the pleader to relief, the presence also of an erroneous conclusion from the facts averred will be disregarded. *Calkins v. Worth*, 215 Ill. 78].

(f) 8 T. R. 79; 2 Chitt. Pl. 503-506, 524-530.

stance also, the proposition involved in the clause just quoted, is only an *inference* of law from the facts which constitute the justification, and therefore is not of the substance of the plea.

4. PARTICULAR CUSTOMS AND PRIVATE STATUTES.—In pleading *particular customs*(g) not only must the *facts* which bring the case within the custom or statute be pleaded; but the custom or statute *itself*—or at least so much of it as is material to the case—must be *recited* by the party complaining or defendant under it,(i) the recital, in these cases, is not to be deemed matter of *law*. For such customs and statutes—although they may respectively furnish the *rule of decision* in cases falling within them—are no part of the general law of land; but like private records, prescriptions, deeds, &c. are regarded and treated in pleading as matters of *fact*, of which the courts of justice cannot judicially take

(g) 1 Black. Com. 76; Co. L. 175; Litt. § 265; Dr. & St. 18.

(h) [It is a familiar rule of pleading that it is not necessary to plead a domestic general statute. *O'Brien v. Kursheedt*, 29 N. Y. Suppl. 973. An example of a public statute is the Greater New York charter. *Edwards v. Law*, 63 App. Div. 451. See *supra*.

Under the Connecticut Practice Act it is not essential to the sufficiency of a complaint framed for recovery upon a domestic public statute, not penal, that the statute be either recited or counted upon. It is enough if the averments of the complaint are such as to show that the action is brought upon the statute and not otherwise. *Leone v. Kelly*, 77 Conn. 569, per Prentice, J.J.

(i) 1 Black. Com. 86; Cro. Jac. 139; 4 Co. 76; 2 East, 341; Bac. Abr. *Statute*, L. 2; 1 Saund. 193.

There is a material distinction, not always observed by writers on pleading—and the non-observance of which has sometimes occasioned confusion—between *pleading*, *counting upon*, and *reciting* a statute. *Pleading* a statute, is merely *stating the facts* which bring a case within it, without making mention or taking any notice of the statute itself. *Counting upon* a statute, consists in making *express reference* to it—as, by the words, 'against the form of the statute' (or, 'by force of the statute') 'in such case made and provided.' *Reciting* a statute, is quoting or stating its contents. A statute may, therefore, be *pleaded* without either reciting or counting upon it; and may be *counted upon* without being *recited*.

notice. (*j*). Hence it is, that the existence of any such custom or statute may be *denied* by plea (*k*); and that when so denied, it must be proved as a *fact*, and can be tried only on an issue in fact. Whereas, matter of *law*, properly so called, can never be denied in pleading. (*l*)

5. FICTIONS.—But under the rule requiring all material *facts* to be pleaded, it is sometimes necessary to allege not only those which really exist; but also certain *conclusions* or *fictions*, which the law founds upon, or connects with them, and which it regards as *facts*, though they exist only in legal intendment.

Fictions in pleading were devised for the sole purpose of advancing *justice* (*m*); and having been sanctioned for this

(*j*) 1 Black. Com. 86; 4 Co. 76 a. b.; 1 Stra. 187; Doug. 378, 380, n.; 1 Taylor Ev. Chap. II; 1 Greenl. Ev. Chap. II. [*Goldsmith v. Sawyer*, 46 Cal. 209; *Albright v. Cortright*, 64 N. J. L. 330; *Overman v. Hoboken City Bank*, 30 N. J. L. 61; *Post v. Pearsall*, 22 Wend. 425; *Wilcox v. Wood*, 9 Wend. 346. The distinction is to be borne in mind between a local custom and a general custom, it being permissible to prove the latter without pleading it. *Thayer v. Coal Co.*, 121 Ia. 121; *Fish v. Crawford Mfg. Co.*, 120 Mich. 500; *Hewitt v. Lumber Co.*, 77 Wis. 548].

(*k*) Bac. Abr. *Statute*, L. 2.

(*l*) 8 Co. 28.

Section [530] of the Code does away with *reciting* a private statute [it being sufficient to designate it by its chapter year of passage and title, or in some other manner with convenient certainty]; but *counting* upon it still remains necessary, although the *form* of counting upon it is there prescribed. As to a *public* statute, the rule under the Code is the same as it was before.

In regard to statutes giving *penalties*; and the provisions of our Revised Statutes, as to the requisites of the summons and complaint, see 16 How. Pr. Rep. 46, (which case was *affirmed*, on appeal, by the General Term of the Supreme Court, in the Third District) 17 Ib. 193; 18 Ib. 302, 331; 5 Abbott Rep. 384.

(*m*) 3 Black. Com. 43, 107. Fictions in pleading are seldom employed, except in the *declaration*; but are not, however, *universally* confined to that part of the pleadings.

[As Sir Henry Maine points out, fictions were "absolutely neces-

purpose, they require, on the one hand, no proof, and on the other, they cannot be traversed (*n*): since to require the one, or permit the other, would defeat the end for which they were designed. The fictions employed in pleading are numerous; but their general nature and operation may be sufficiently illustrated, for the present purpose, by two or three familiar examples:—

ILLUSTRATIONS.—a.—In the action of *indebitatus assumpsit*, if there is an actual *debt* or *legal liability*, (by simple contract), on the part of the defendant, but, as is frequently the case, no *express* undertaking to pay the debt; the plaintiff, in his declaration, must regularly allege a *promise*. (*o*) For as the action of *assumpsit* is, in its form

sary in early stages of society," and contributed greatly to the improvement of social conditions. Ancient Law, p. 25.

A fiction which survives to this day is that which allows a parent to recover for the seduction of his daughter only on an allegation of loss of service—*per quod servitium amisit*. No loss of service need be proved on the trial. "It is but a figment of the law to open the door for the redress of his injury. * * * He comes into court as a master; he goes before the jury as a father." *Briggs v. Evans*, 27 N. C. 16. The law conclusively presumes that an actual loss has been suffered. *Snider v. Newell*, 132 N. C. 614.

However, in some States, by statute, it is unnecessary even to allege loss of services in such a case. Ga. Civ. Code, § 3870; Mich. Comp. Laws, § 10418. See *Taylor v. Daniel* (Ky.), 98 S. W. 486. And it has been sensibly held in some of the Code States that the provision abolishing fictions has made the allegation unnecessary. *Anthony v. Norton*, 60 Kan. 341, 349, 350. And see opinion of Clark, C. J., in *Snider v. Newell*, *supra*.

Fictions are sometimes permitted under the modern system, but are not necessary. "Neither the letter nor the spirit of the law now requires a party to plead what is not true." *Ball v. Beaumont*, 59 Neb. 631].

(*n*) *Id.*; Cowp. 177-8.

(*o*) Cro. Eliz. 913; 1 Lev. 164; 2 Ld. Ray. 1517; 2 Stra. 793. It is held, however, that in declaring, in *assumpsit*, on a *bill of exchange*, against the drawer, or on a *promissory note*, against the maker, a statement of the facts, which render the defendant liable to pay, is sufficient, without expressly alleging a *promise* on his part.

and structure, adapted to no other demands than those arising upon *promises*; the law,—when no promise has actually been made—*implies* or *presumes* one, from the fact of the defendant's being indebted; for the purpose of entitling the plaintiff to this beneficial action, instead of the precarious and less remedial action of debt, which was anciently his *only* remedy in such a case. But whenever the promise is thus implied, it is declared upon as an *express* one and upon the face of the record is always taken to be express. There is, indeed, no such thing as an implied promise *in pleading*; or rather, the fact of its being implied appears only in *evidence*, and never upon the record. (*p*)

(1 Salk. 128; 1 Stra. 224; Ld. Ray. 538; 2 New Rep. 63, n.) The reason, assigned for the rule, is, that the drawing of the bill, or making of the note, is of itself an *actual* promise: So that alleging the act of *drawing*, &c., is virtually alleging a *promise*, by the drawer, &c., to pay.—Whether this rule, so far as it regards the declaration on a *bill of exchange*, (in which the drawer makes no *express* promise) is agreeable to the analogies and principles of pleading, appears at least questionable. For in all other cases of *indebitatus assumpsit*, the facts, stated in the declaration, as the ground of the defendant's liability, are regarded, upon the face of the record, only as the *consideration* of the promise, which the declaration alleges, and must allege. But whether the rule is, on principle, correct or not, the universal practice is, to allege a *substantive promise*, by the drawer of the bill.

(*p*) 6 Mod. 131; Cowp. 289; 7 T. R. 351, n.; 1 Ld. Ray. 538.

[The promise must be set out, but it is not necessary to allege it in terms. The allegation of facts showing a duty from which the law implies a promise complies with the Code rule that facts showing a cause of action must be alleged. *Wilcox v. Jamieson*, 20 Col. 158; *Cox v. Pettier*, 159 Ind. 355; *Farron v. Sherwood*, 17 N. Y. 227; *Moody v. Richards*, 29 Oreg. 282].

In some cases, under the Code, it has been held, that an averment, in a complaint, that the defendant *was indebted* to the plaintiff, was not an averment of a *fact*, but of a *legal conclusion* from facts stated. This is certainly, far from the doctrine of the text; and that of the text seems to be the correct one. In saying that A. is *indebted* to B. for the value of a horse, which B. sold to A.; the statement is one of *fact*, just as much as would be the statement that A. bought of B. a horse, for which he promised to pay \$100, in six months:

b. In trover also, the goods, for the conversion of which the action is brought, are, according to the precedents, alleged to have been *lost*, and to have come to the defendant's hands by *finding*.(q) For as trover originally lay only for the conversion of goods *actually* lost and found(r); the averment of a *loss* by the plaintiff, and a *finding* by the defendant—which in most cases is a mere fiction—was, at a later period, introduced for the purpose of extending this liberal action to cases, in which there was anciently no other remedy, than that offered by the more narrow and inconvenient action of *detinue*.(s) And thus, by the aid of this fictitious averment, which is not traversable, the action of trover now lies in all cases, in general, in which he who is, by *any* means, in possession of another's personal chattels, converts them to his own use.(t)

Buying the horse does not make him *indebted*; for he *may* have paid cash for the horse.—The *legal action*, (on the first state of facts, on which *indebitatus assumpsit* lay,) was in the averment that, being indebted, he *promised to pay*;—not in that he was indebted. To be sure, an answer, (being one to the *whole* complaint,) which, while it *denies the indebtedness*, does *not deny those facts*, averred in the complaint, from which a liability is *necessarily inferred*, is not a good answer; and may be struck out as frivolous,—(since there is no demurrer to such an answer:)—But that ruling does not make this averment of indebtedness an averment of matter of law. (*Drake v. Cockroft*, 10 How. Pr. Rep. 377.) In such a case, the plaintiff is entitled to judgment, because he has a *cause of action not answered*. But could the defendant *admit the indebtedness*, and not have judgment given against him?—In accordance with this reasoning see *Holstein v. Rice*, 15 How. Pr. Rep. 1. See also 3 Seld. 476.

(q) 1 Lill. Ent. 70; 3 Black. Com. 153; 2 Chitt. Pl. 223–231.

(r) 3 Black. Com. 152; Bac. Abr. *Trover*, *Intro*d.

(s) 3 Reeve H. E. L. 385–6, 526; 2 Black. Com. 153; 3 Woodes. 212.

(t) Bac. Abr. *Trover*. *Intro*d.; Cro. Eliz. 781; Bull. N. P. 33.

Since the action has been thus extended, it is held, that the averment of *finding* is not indispensable (5 Bac. Abr. *Trover*, F. 1; Bull. N. P. 33). It is still retained, however, in the approved precedents.

Again the principles of pleading had cleared themselves of the

c. So also in the modern English *ejectment* which lies nominally only for a *term of years*, the lease to the nominal plaintiff, his entry under it, and the *ouster* charged upon the casual ejector, (all which were originally material *facts*, and are still stated as facts in the declaration), are in reality mere fictions, devised for the purpose of escaping from the inconvenient forms of real actions, and facilitating the determination of questions of title to *real property*.(u) And by these fictions, aided by corresponding rules of practice, this convenient remedy is accommodated practically to the trial of *freehold* titles.(v) When ever it is necessary for a party, in any stage of the pleadings, to show an estate in *fee simple*, it is sufficient, in general, to allege the estate in *general* terms, (as that he, or another, was 'seised in his demesne as of fee'), without stating *when* or *how* the estate commenced, or was created.(w) But when title to any *particular* estate—as an estate in tail, for life, or for years—is necessary to be shown in a plea *in bar*, *avowry*, *replication*, or any of the pleadings *subsequent* to the declaration, the *commencement* of the estate, and the mode of its derivation, must

fiction. The 'approved precedents' needed merely to be *disapproved*, by the courts.

(u) 3 Black. Com. 199, 201, 206; 2 Burr. 667-8.

(v) 1 Wils. 220; 7 T. R. 327, 334; 1 Bos. & P. 573. [The code provision abolishing feigned issues abolished fictitious proceedings in the old action of ejectment. *Harkey v. Houston*, 65 N. C. 137. This action is regulated in New York by N. Y. C. C. P. 1496 *et seq.* Formal allegations of ouster and wrongful withholding by defendant are unnecessary if the facts appear from the complaint. *Van Voorhis v. Kelly*, 31 Hun 293. An allegation of seisin in fee followed by an averment of unlawful withholding is sufficient on general demurrer. *Halsey v. Gerdes*, 17 Abb. N. C. 395].

(w) 1 Ld. Ray. 333; 2 Salk. 562; Comb. 476; Carth. 444; 3 Wils. 70, 72; 12 Mod. 191. [*Overbakh v. Oathout*, 90 Hun 506. And see *Masterson v. Townshend*, 123 N. Y. 458. But an allegation that the plaintiff was entitled to the possession of land and to the rents and profits thereof is a mere allegation of a conclusion of law. The facts should be alleged. *Sheridan v. Jackson*, 72 N. Y. 170].

be specially stated.(x) The principal reason of this diversity appears to be, that an estate in *fee simple* may be, and frequently is acquired by means, consisting of sheer matter of *fact*, (as by a continued disseisin of the rightful owner, or by long possession), of which the jury is competent to judge(y); and which need now, therefore, be especially shown to the court upon the record: and hence a *general* allegation of a seisin in fee simple is traversable.(z) Whereas *particular* estates, which must always be derived out of the fee simple, can regularly be created only by legal conveyance, or by operation of law (a); both of which modes of acquisition necessarily involve matter of *law*; of which the jury are not competent judges: and therefore, a *general* allegation of a seisin or possession of *such* an estate (in a *plea*, etc.) is ill because it improperly blends law and fact, and therefore is not traversable.(b) It is hence necessary—when title to estates of the latter kind is to be averred in a *plea*, avowry, &c.—that the time and manner of their derivation be specially shown in the pleading; that the plaintiff may be able to traverse distinctly any particular point in the title. For as there is no *general issue* to pleas, avowries, replications, &c; no traverse can, in general, be taken upon them, otherwise than by denying *precisely* some or all of the specific allegations contained in them.(c) But in *personal* actions, this latter rule holds, in general, only of those parts of the

(x) Id. By the New York Revised Statutes, (which, on this subject, still remain the law,) *whatever* the estate be, it may be alleged *generally*. And as we have no pleadings, (subsequent to the complaint,) which require the affirmative averment of a particular estate; the latter part of this section is here inapplicable;—however much a rule different from ours might tend to *certainty*.

(y) 2 Salk. 562; 3 Wils. 72; Co. Lit. 297, a.

(z) Comb. 476; 12 Mod. 191.

(a) 3 Wils. 72; 12 Mod. 191; 2 Salk. 562.

(b) Comb. 476; Carth. 445; 12 Mod. 191; 2 Salk. 562.

(c) [In the Code States] the reason for such a rule of pleading *might* well be, that we have *no issue*, (general or special,) to answer.

pleadings, which are *subsequent* to the declaration. And therefore if a tenant in tail, for life, or for years, brings a suit for an injury to his possession, (as in trespass *quare clausum fregit*, trespass on the case for obstructing a way, &c.); it is not necessary for him to state the commencement of his title in his *declaration*.(d) For the action is not founded on *title*, but on *possession*. It is not necessary, therefore, in such a case, to state his *title* in any manner whatever: it being sufficient to allege merely his *possession*. For, as against a *wrong doer*, possession alone, in the plaintiff, is sufficient (e); and in actions of this kind, the defendant is always charged as such.(f) And in general, when, as in the preceding cases, a particular estate is only matter of *inducement*, it is unnecessary, in *any* stage of the pleadings, to state when or how it commenced(g): the reason of which is apparent, from the principles, (already stated), which regulate the pleading of matter of inducement, in general. Indeed the single consideration, that such matter is never contested in the *pleadings*, furnishes a sufficient reason for the rule. And therefore, in an action of trespass for an assault and battery, if the defendant, being a tenant for years of a house or land, justifies the acts complained of, as having been done in resisting the plaintiff's unlawful entry into the one, or upon the other; it is sufficient as regards the matter of *title*, for the defendant to aver in his plea, that he was '*possessed of a certain dwelling-house*' (or '*a certain close*') &c. without stating the time at which, or the manner

(d) 2 Salk. 562; Comb. 476; Cro. Car. 571; Carth. 444.

(e) 1 Ld. Ray. 333, 266; Com. Dig. *Pleader*, C. 39; Sayer, 32; 1 Wils. 327; 1 Vent. 319.

(f) This *principle* is the one, on which *justices of the peace* in New York can try actions of trespass *quare clausum fregit*; when *title* is not actually brought in question. *Ehle v. Quackenboss*, 6 Hill, 537; *Smith v. Riggs*, 2 Duer, 622.

(g) 3 Wils. 72; 1 Ld. Ray. 334; 8 T. R. 79, 299; 2 Chitt. Pl. 529-531; Com. Dig. *Pleader*, C. 43, E. 19; Carth. 444.

in which, his possession commenced.(h) For to his plea, his estate or possession is but matter of inducement.

MATERIAL FACTS MUST BE STATED POSTIVELY AND DIRECTLY.—As a general rule, all *material* facts(i), pleaded on either side, must be stated in *positive and direct* terms, and not *argumentatively*, (i. e. in a manner which leaves them to be collected by *inference*) (j); nor by way of

(h) *Idem*.

(i) *Material* facts are such as are *essential* to the right of action, or defense, and are therefore of the *substance* of the one, or the other.

[The rules as to materiality were modified by the new procedure which provides for but one form of action, for formerly it was necessary to allege facts sufficient to show not only a right but a right to recover in the particular form of action selected. So that now the test of what is material and what is defective in form rather than in substance is somewhat different. *Morehouse v. Throckmorton*, 72 Conn. 449, per Hamersley, J. Nevertheless, now, as fully as at common law, the material facts upon which the complainant relies must be set up. *Greenthal v. Lincoln, Seyms & Co.*, 67 Conn. 372. And the language of Judge Hamersley, quoted above, is not to be taken as meaning that in framing the allegations of the complaint no regard need be paid to the form of the action. See *Phillips v. Sonora Copper Co.*, 90 App. Div. 140, 148, where the complaint was held defective because no fact was alleged which would justify the court in awarding to the plaintiff any relief in the form of action which he had brought].

(j) [*Wadhams v. Swan*, 109 Ill. 46; *Severy v. Nye*, 58 Me. 246; *Galagher v. Dunlap*, 2 Nev. 326; *Quindy v. Melvin*, 28 N. H. 250; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52.

A *plea is argumentative* which adopts a different construction of a contract from that adopted in the declaration. *Cobb v. Heron*, 180 Ill. 49. An argumentative denial is no denial. *Woodruff v. N. Y. & N. E. R. Co.*, 59 Conn. 63, 89, where not the fact but the purpose of certain resolutions was denied.

For an example of an argumentative plea, see *Borland v. Prindle, Weedle & Co.*, 114 Fed. 713, where the declaration set out an agreement alleged to have been entered into by B., and the plea set out an agreement and alleged that P. entered into such an agreement with the plaintiff, and that such agreement was the agreement of P. and not of B.

In New York argumentativeness is not a fatal defect. It is suffi-

recital, as under a 'whereas.' This requisite is prescribed, not only for the sake of *precision*; but also that the adverse party may be enabled to traverse the matter alleged, *directly* and *distinctly*.

ILLUSTRATIONS.—*Argumentative Pleas*.—And therefore, if in an action of covenant broken; the defendant—instead of pleading *performance* generally, or specially, as the nature and terms of the contract may require—pleads that he has *not broken* his covenant; the plea is ill.(*l*) For it leaves the fact of *performance* to be *inferred* from that of the covenant's not being broken.(*m*) So that the former fact, (the only one, on which such a plea can be supposed to be founded), cannot be *directly put in issue* by a traverse of the plea.(*o*)

cient if the necessary allegations can be gathered from the whole of the complaint, though the statement be argumentative, and deficient in logical order and technical language. *Zabriskie v. Smith*, 13 N. Y. 322, 330; *Sage v. Culver*, 147 N. Y. 241.

If not attacked by a motion to make more definite and certain (*Cowper v. Thrall*, 4 N. Y. St. Rep. 674, 26 Wkly. Dig. 73), the evidence must be received on the trial (*Brown v. Richardson*, 20 N. Y. 472, 474).

In some States such objectionable matter may be struck out on motion (*Nidblack v. Goodman*, 67 Ind. 174), or demurred to (*Clinton County Commissioners v. Hill*, 122 Ind. 215).

Formerly the objection could be raised by special demurrer only. *Pendleton County v. Amy*, 13 Wall. 297, 303].

(*k*) Co. Litt. 303, a.; Bac. Abr. *Pleas*, &c. B. 5, (4) 1, 5; *Trespass*, 1, 2; [*Benham v. Mornington*, 3 C. B. 140].

(*l*) 8 T. R. 278; 2 Black. 1312; 2 Vent. 156.

(*n*) The plea stated in the text would also be ill, as improperly blending law and fact.

(*o*) All *recitals* are done away with in N. Y.; and every averment must be *direct* and positive. *Argumentative* pleading is as bad as at common law. (*Catlin v. Gunter*, 1 Duer, 253; 3 Seld. 476.) It is, however, to be objected to *only by motion* to strike out: Since, if a party be allowed to go to trial on such pleading, the *inference* is either *proved* directly, or *found* from what is proved; and the judgment is well sustained. (See post sections 30, 33.) *Hypothetical* pleading is, also, bad. *Hamilton v. Hough*, 13 How. Pr. 14; 9 Ib.

Upon the same principle, if in trespass for tearing the seal from a deed, alleged to have been made by A. to B., and to have conveyed to B. a certain manor, the defendant pleads

543). So is *alternative* pleading,—as it always was. 8 Mod. 329; 8 Pr. Rep. 193.

[*Allegations in the alternative* are objectionable. *Jamison v. King*, 50 Cal. 132; *Pittsburg, C. C. St. L. R. Co., v. Peck*, 165 Ind. 537; *Stone v. Graves*, 8 Mo. 148.

The state of the law in New York is well stated in *Hasberg v. Moses*, 81 App. Div. 199, 205, where the court said :

"Because the pleading states facts for relief in an alternative form does not make it bad, if any one of such averments would be sufficient upon which to found the relief asked for in the complaint. *Pittsfield Nat. Bank v. Taiter*, 60 Hun 130; *Zimmerman v. Kinkle*, 108 N. Y. 282.)

"Mr. Abbott, in his note to *Munn v. Cook* (24 Abb. N. C. 314), very clearly states the rule governing such cases: 'As before explained, there is a class of cases in which, for no fault of his own, and usually by fault of the defendant, the plaintiff does not know which of two absolutely inconsistent grounds he may succeed in proving, either of which will entitle him to recover, as in the case of fraud and mistake, or a case of suspected agency for an undisclosed principal. If it is important to plaintiff's policy, as it usually is, especially in such classes of cases, to obtain a sworn answer, he must make a sworn complaint, and he cannot, even on information and belief, swear to inconsistent facts. Therefore he cannot state such inconsistent grounds of recovery in separate causes of action, each alleged without qualification. He must state them, if at all, in a single cause of action and in the alternative. A rule which allows plaintiff to state essential allegations in the alternative is, obviously, capable of much abuse, because by multiplying alternatives he may leave the defendant quite in the dark as to the facts the latter must be prepared to meet. But within limits which will exclude such abuses, the right of the plaintiff to allege alternative grounds is now recognized by the highest authority, and is not without sanction in the lower courts and courts of other jurisdictions.' (Pp. 332, 333.) Averments in this form are not the subject of demurrer. The remedy, if they are so uncertain as to leave the adverse party in the dark in respect to that with which he is charged, is by motion to make the pleading more definite and certain. (*Marie v. Garrison*, 83 N. Y. 14; *Scheu v. N. Y. L. & W. R. R. Co.*, 12 N. Y. St. Repr. 99, and cases cited.) There is little difficulty in the way of giving force and effect to this rule of pleading and protecting at

that A. did *not* convey the manor to B.; the plea is argumentative, and of course ill(*p*): since it denies the trespass only by *inference*—i. e. only by denying the existence of such a deed as that described—instead of putting the wrongful *act* alleged directly in issue. The proper plea, for the defence pleaded, in the case here stated, would be the general issue.

Argumentative pleading is aided, however, by verdict, or on general demurrer.(*q*) For the defectiveness of such pleading is not in the *matter* pleaded, but in the *manner* of pleading it; and it is therefore only a fault in *form*.

Recitals—"Whereas."—It is for a similar reason, that

the same time the adverse party against any abuse which may arise therefrom."

By statute, in some States, alternative pleading is allowed by some such provision as the following statute of Kentucky: "A party may allege, alternatively, the existence of one or another fact, if he states that one of them is true, and that he does not know which of them is true." *Louisville & N. R. Co. v. Wyatt's Adm'r*, (Ky.) 93 S. W. 601, 604, holding that such provision does not limit the pleader to the statement of two inconsistent facts.

So *hypothetical pleading* is bad in an answer since the defendant must either deny, or confess and avoid. *Goodman v. Robb*, 41 Hun 605.

But hypothetical statements may be made in an answer to enable the defendant to plead all his defenses. *McKasy v. Huber*, 65 Minn. 9; *Nunnemacher v. Johnson*, 38 Minn. 390; *Ketcham v. Zerega*, 1 E. D. Smith 553. For example, when the defendant alleges that he has no knowledge of the transaction set out in the complaint he may go on to allege that if any such claim ever existed it has been paid. *Dovan v. Dinsmore*, 33 Barb. 86, 90.

The New York decisions are not in harmony as to whether hypothetical pleading is to be taken advantage of by demurrer or by motion to strike out. The latter method is to be preferred. See discussion by Bartlett, J., in *Corn v. Levy*, 97 App. Div. 48. But in some jurisdictions a general demurrer is proper. *Ilfeld v. Ziegler*, (Col.) 91 Pac. 825].

(*p*) Yelv. 223; Com. Dig. *Pleader*, E. 3.

(*q*) Com. Dig. *Pleader*, E. 3; 1 Saund. 274 (n. 1.); Aleyn, 48; 9 Johns. 314; Cont. Bac. Abr. *Pleas*, B. 5 (4).

the general rule disallows the allegation of material facts by way of *recital*; as under a 'whereas.' (r) For as this form of averment does not *directly assert* the fact recited, a traverse of the averment would not put the fact *directly* in issue. If therefore, in an action of trespass for an assault and battery, the plaintiff should complain, by saying in his declaration, '*whereas* the defendant with force and arms assaulted,' etc., or if in trespass *quare clausum fregit*, he should declare '*whereas* the defendant with force, etc., broke and entered his close;' the declaration would, in both cases, be ill. (s) For this mode of stating the injury would not constitute a positive allegation of the trespass in either case; and the plea of *not guilty* would be tantamount only to saying, in the one case, '*whereas* the defendant did not with force and arms assault,' etc., and in the other, '*whereas* he did not with force, etc., break and enter the plaintiff's close.'—A principal reason therefore, why the averment of material

(r) [*Ind., Bloomington & West. Ry. Co. v. Adamson*, 114 Ind. 282, 284.

The rule forbidding the statement of facts constituting the cause of action under a "for that whereas," has been said to be purely technical, and not to be extended to cases not clearly within it to the defeat of justice. So that if the meaning is plain, and the statement is not technically by way of recital, no "whereas" being used, a pleading will be sustained though it uses the participial form of the verb instead of making positive assertions by the use of the present and imperfect tenses of the indicative mood. *Battrell v. Ohio Riv. Ry. Co.*, 34 W. Va. 232.

That the allegation of facts by way of recital instead of directly is to be taken advantage of by special demurrer, and otherwise waived, is held in *Fuller Desk Co. v. McDade*, 113 Cal. 360].

(s) Bac. Abr. *Pleas*, &c. B.; Tresp. I. 2, 5, 4.; Co. Litt. 303, a.; 2 Salk. 636; 1 Stra. 621; Com. Dig. *Pleader*, C. 86.

When the suit is by *original writ*, (as in the English court of Com. Pleas,) such an averment in the declaration is good—being aided by the *recital of the writ*, in the declaration.. (Com. Dig. *Pleader*, C. 86; 1 Willa. 99; 2 Ib. 203; Fort. 376; Bac. Abr. *Tresp.*, I. 2.

facts by way of recital is inadmissible, is, that as such averments do not admit of a *direct* negative, no proper *precise* issue can be taken upon them.

But in debt on bond, the allegation that '*whereas* the defendant, by his writing obligatory, sealed,' &c. 'acknowledged himself held and bound,' &c. 'yet he has not paid,' has always been held a sufficient averment of the execution of the bond; though the fact, which is the gist of the action, is stated only by way of recital: and in this form are all the common precedents of declarations on bonds, covenants, and specialties of every kind.(*t*) The reason of this apparent deviation from the general rule is said to be, that as the statement under the '*whereas*' is part of an entire sentence, of which the *latter* clause is a positive averment, the *former* part is in construction also positive, and therefore capable of being directly traversed.(*u*) However this construction may appear in a grammatical view, it has always prevailed in the forms of pleading.

But in a declaration, the whole of which may be denied by the general issue, a material averment, under a '*whereas*,' though formerly held incurable, is now amendable, and is ill only on *special* demurrer(*v*): The defect being not in the *matter* alleged, but in the *manner* of alleging it.

The words pro eo quod, (for this that)—*quia* (because)—and *licet* (although,) are respectively sufficiently direct and positive for introducing a material averment (*w*); as they are all considered as terms of *affirmation*. But the word '*quare*'

(*t*) Bac. Abr. *Pleas*, &c. B. 5. [4.].—1 Lill. Ent. 144-187; 2 Chitt. Pl. 151-178, 191-9.

(*u*) Bac. Abr. *Pleas*, &c., B. 5. (4.)

(*v*) 2 Salk. 636; 1 Stra. 621; Com. Dig. *Pleader*, C. 86; 2 Stra. 1151, 1162; 1 Chitt. Pl. 375; 1 Wills. 99; 2 Mass. 358; 7 Johns. 109; 23 Pick. 235; 16 M. & W. 36.

(*w*) 1 Saund. 117. (n. 4.); Com. Dig. *Pleader*, C. 77; 1 Lev. 194; 2 Lill. Ent. 429, 431, 435; 2 Chitt. Pl. 369-393.

(wherefore), though used in the *writ* in certain actions, is inadmissible in a material averment in the *pleadings* (x): For it is merely *interrogatory*. And therefore a declaration which begins with complaining of the defendant, 'wherefore with force, &c. he broke and entered,' the plaintiff's close, is ill.

Videlicet—Scilicet.—A material averment may also be introduced by a *videlicet*, or *scilicet* (*to wit*); in which case, if the averment immediately preceding the '*viz.*' is direct and positive, that which immediately follows it is so. (y) Thus if the plaintiff in trespass declares that the defendant took and carried away his '*goods, viz.*' such and such articles specifically mentioned, the specification under the '*viz.*' is a positive and traversable averment. (z) So also in debt on bond, for the penal sum of £1000, if the defendant pleads that there is due on the bond 'a much less sum than £1000, *viz.* £500, and *no more*,' this last averment under the '*viz.*' is regarded as a *direct* allegation, and is traversable, as it would have been, if the *viz.* and the quoted words immediately preceding it, had been omitted. (a)

The proper office of a *scilicet*, or *videlicet*, is to *particularize* what is *general* in the words preceding it, or in some other manner to explain what goes before it. (b) A '*viz.*' may

(x) 2 Salk. 636; Bac. Abr. *Pleas*, &c., B. 5. (4.)

(y) Hob. 172; Com. Dig. *Parols*, A. 8.

(z) 2 Chitt. Pl. 99, 272, 379, 385.

(a) 2 Saund. 291, b. (n. 1.); 6 T. R. 460; 2 Wills. 332, 335.

(b) Hob. 175; 2 Saund. 291, b. (n. 1.); 2 Wills. 332, 335.

["The common office of a *videlicet*," said Cooper, J., in *Sullivan v. State*, 67 Miss. 346, 354, "is to state time, place, or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made; but it may be and is frequently used as particularizing the more general antecedent matter." It is used to indicate that the pleader does not undertake to prove circumstances precisely as alleged. *Chicago Terminal Transfer R. Co. v. Young*, 118 Ill. App. 226. And see *Com.*

therefore restrain the generality of preceding *words*, but cannot enlarge or diminish the preceding *subject matter*.(c) For in the former case, the '*viz.*' is merely an *explanation* of the language which precedes it; but in the latter, it is *repugnant to*, or *variant from*, the preceding matter. Thus if a grant is made to 'A. and his heirs, *viz.* heirs of his body,' the interest granted is an estate tail (d): for here the '*viz.*' is only explanatory of the sense in which the word 'heirs' is first used, and not inconsistent with it. But if

v. Quinlan, 153 Mass. 483; *Com. v. Hart*, 10 Gray 465, 468 (where the indictment charged the defendants with maintaining a "common nuisance, to wit a certain building, to wit, a house of ill fame"); *Buck v. Lewis*, 9 Minn. 314, 317; *Oliver v. Oregon Sugar Co.*, 42 Oreg. 276].

It is usual, in civil and in criminal pleadings, to allege circumstances of time, place, quantity, magnitude, etc., under a *videlicet*. The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to identify, to distinguish, and to fix with certainty, that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects. 1 Stark. Crim. Pl. 2d ed. 251; 2 Gabbett Crim. Law, 225; *Commonwealth v. Hart*, 10 Gray, 468; *United States v. Quincy*, 6 Peters, 467, 468; Wms. Notes to Saund. 687. In discussing the effect of the *videlicet*, Mr. Justice Patteson observed, that it could not make that immaterial which was in its nature material, though its omission might render that material which would not otherwise be so. *Cooper v. Blick*, 2 Q. B. 915, 918; 2 G. & D. 295; *Ryalls v. The Queen*, 11 Q. B. 781, 797.

With reference to the real utility of a *videlicet* before matters of description, it is said in Smith's Leading Cases that it depends on the doctrine of the rejection of averments as surplusage. The learned author continues: "It is a precaution which is totally useless where the statement placed after the *videlicet* is material, but which, in other cases, prevents the danger of a variance by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter." 1 Smith Lead. Cas. 6th Eng. ed. 592.

(c) Hob. 172; Com. Dig. Parols, A. 8. [*Duyckinck v. The Clinton Mutual Ins. Co.*, 23 N. J. L. 279].

(d) Id.

one having *three* acres of land in the parish of A., grants 'all his land in A., viz. *two acres*,' the *three* acres will pass^(e): or if he grants 'all his land' in the parish of A., viz. *black-acre*, which lies *out* of that parish; black-acre will not pass by the grant.^(f) For in both these cases the 'viz.' is *repugnant* to that which precedes it. The same distinction applies to the use of a 'viz.' in *pleading*.

Yet in the application of this general distinction to the rules of pleading, there is one important difference to be observed, (as regards the use and effect of a 'viz.')

between the averment, of *material* and immaterial facts. When a *viz.* is followed by what is *material*, and *necessary* to be alleged, and preceded by words of direct averment, the *videlicet*, being regarded as a positive and direct allegation, is therefore *traversable* ^(g): in other words, a material averment under a *viz.* is traversable whenever it would have been so, if it had been made *without* a *viz.* Thus, when in debt on bond for a certain penal sum, conditioned for the payment of a less sum, the defendant pleaded that he was indebted to the plaintiff, 'in a large sum of money, *to wit*, the said sum in the said condition mentioned,' and then alleged special matter in avoidance—an exception was taken to the plea as not containing any statement, in an *issuable* form, of the sum due on the bond: but the court overruled the objection, and held the statement under the '*to wit*,' to be traversable.^(h) And the rule appears to be universal, that *any fact*, which is in its nature traversable, may be traversed, though pleaded under a *videlicet*.⁽ⁱ⁾

(e) Id.; 2 Saund. 291. a. (n. 1.)

(f) Id.; Hob. 170.

(g) 3 Burr. 1730; 1 Saund. 169, 170, (n. 2.); 2 Ib. 291, b. (n. 1.); *Bishop of Lincoln v. Wolfreston*, 1 Black. 495; Yelv. 94, note; *Vatt v. Lewis*, 4 Johns. 450; *Hastings v. Lovering*, 2 Pick. 222.

(h) 2 Wils. 332, 335.

(i) 5 T. R. 71; 1 Ib. 656; 4 Johns. 450; 1 Stra. 233; 2 Saund. 291, a, c. (n. 1.); 6 T. R. 460, 463; 1 Saund. 169, 170, (n. 2.).

It is apparent from what has been said, that a material fact cannot be made *immaterial*, by being pleaded under a '*viz.*' (*j*) Therefore, if an averment under a '*viz.*' contains matter in itself material, but which is *repugnant* to what goes before: the pleading is ill. (*k*) Thus where to an action against the sheriff for an escape, he pleaded a recaption of the prisoner, on fresh suit, '*before* the exhibition of the bill, *viz. on the 8th of May*' (which was in fact, *after* the bill was exhibited), the court held the plea ill. (*l*) For the time of retaking was material; inasmuch as a recaption *after* the exhibition of the bill, is no defence in law to such an action.

As material facts averred under a *videlicet* are traversable; it follows that they must, if traversed, be proved (*m*): For nothing is legally traversable by either party, except what the adverse party may be required to prove. If therefore in pleading a *record*, or *written instrument* of any kind, the pleader misstates the date of it, or otherwise misdescribes it in any material particular, though under a *videlicet*, he must fail in his proof: for the record or instrument, when produced in evidence, will by its *variance* from the description of it in the pleading, appear to be a *different* record or instrument from that pleaded. (*n*)

These sections referring merely to the *effect of language* used in pleading, are still applicable in New York: as are, indeed, the greater part of the *general* rules of common-law pleading.

(*j*) *Id.* [*Ladue v. Ladue*, 16 Vt. 189].

(*k*) [*Cotton v. Ward*, 3 T. B. Mon. 304, 310]. On this point, however, there have formerly been some contradiction and confusion. Latch, 200, 201; Cro. Jac. 135, 154, 662; 12 Mod. 579, 580.

(*l*) Latch, 200, 201; 2 Saund. 291, c. (n. 1.); 1 Black. 495.

(*m*) [*Clark v. Employers' Liability Ass'ce Co.*, 72 Vt. 458, 466-467].

(*n*) 4 T. R. 590, *et vide* 1 Ib. 656; 6 Ib. 463; 2 Saund. 291, b. (n. 1.)

The term '*variance*' signifies, in law, a discrepancy between the statement or description of a record, written instrument, or express contract in *pleading*, and the record, instrument, &c., itself, as shown in evidence.

But if that which comes under a *videlicet* is *immaterial*, or matter of mere *form*; its repugnancy to what goes before does not *vitiate*, or in any way affect, the pleading. In such a case, the *videlicet* is regarded as wholly nugatory and void, and is therefore rejected as *surplusage*.^(o) For as it contradicts nothing that is *material* in what precedes it, (if it did, it could not be strictly *immaterial*), it falls within the legal maxim, '*utile per inutile non vitiatur*.' And the pleading will be good or ill, precisely as it would have been, if the '*videlicet*,' including the averment under it, had been omitted or struck out. Thus, if in trover the plaintiff declares that he was possessed of the goods in question, on the *tenth* day of May, in such a year, and that the defendant, '*postea*' (*afterwards* '*to wit*, on the *first* day' of the same month, converted them, the '*videlicet*' will be rejected as surplusage except on special demurrer.^(p) For the particular day of the conversion being *immaterial*, and that stated under the '*videlicet*' being repugnant to the preceding '*postea*,' the '*videlicet*' is held to be void. The consequence is, that the declaration will stand, in regard to its legal sufficiency, as if the plaintiff had alleged that he lost the goods on the 10th day of May, and that the defendant

(o) 1 Lev. 195; 1 Saund. 116, 287; 2 Ib. 291 (n. 1.); Com. Dig. *Pleader*, C. 19.

In most of the numerous cases, usually cited to this point, the question has arisen *after verdict*. It was directly decided, however, in the case cited above from 1 Lev. 194-5, and 1 Saund. 116, (which was determined upon great deliberation, and after several arguments), that the rule holds as well before, as after verdict.

[But it is only when the matter unnecessarily stated is wholly foreign and irrelevant to the cause, or is repugnant to what goes before that it can be rejected as surplusage. *Clark v. Employers' Liability Ass'ce Co.*, 72 Vt. 458, 466. And see, *Brown v. Berry*, 47 Ill. 175, 177; *State v. Heck*, 23 Minn. 549, 550; *Gleason v. McVickar*, 7 Cow. 42].

(p) Com. Dig. *Pleader*, C. 19; Cro. Jac. 428, 135; 1 Lev. 195; 12 Mod. 579; Stra. 232, 1095.

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'*afterwards* converted them,' (omitting the *videlicet*, and stating no particular day;) in which case the declaration would be good, unless *especially* demurred to.(q) So also, if the plaintiff in ejectment declares on a lease dated the *tenth* day of May, by virtue of which he entered, and alleges that the defendant, '*afterwards*, to wit, on the *first* day' of the same month, ejected him; the '*videlicet*' will be rejected, as in the last case; and the effect will be the same,(r) and for the same reason. It is hardly necessary perhaps to add, that an *immaterial* '*videlicet*' cannot be traversed, and need not be *proved*.(s)

But a *videlicet* can never be rejected, *unless repugnant* to what goes before it.(t) For when *consistent* with what precedes it, there can be no more propriety in rejecting it, than there would be in rejecting and treating as surplusage any, and every other averment, which the pleader might find to operate against himself.

WHEN MATERIAL FACTS NEED NOT BE STATED POSITIVELY.—The general rule, requiring material facts to be alleged in terms of *direct and positive* averment, is itself by no means universal. For in *declarations*, facts which are material, and even of the *gist* of the action, may in some instances be stated under a '*whereas*.' And the distinction, collectible from the precedents, appears to be, that all those facts which are *directly denied by the terms of the general issue*, or which may, by the established usage of pleading, be *especially traversed*, must be averred in *direct and positive*

(q) 1 Lev. 195; 1 Saund. 286, 287, a; Com. Dig. *Pleader*, C. 19; *vide* Cro. Jac. 96, 429.

(r) Cro. Jac. 96; Com. Dig. *Pleader*, C. 19.

(s) 1 Black. 495, *per Blackstone, arg.*; 2 Saund. 291, c. (n. 1.); 3 T. R. 68; *Vide* 3 M. & S. 175.

(t) 5 East, 244; 1 Saund. 169. [When it would enlarge or diminish the preceding subject-matter it is repugnant. *Clark v. Employers' Liability Ass'ce Co.*, 72 Vt. 458, 466].

terms: But the facts, however material, which are *not directly denied by the terms* of the general issue, though liable to be contested under it, and which, according to the usage of pleading, *cannot be specially traversed*, may be alleged in the declaration by way of recital. (u)

The reason of this distinction appears to be, that as facts of the former class are *directly* traversable, either by the general or a special issue; they ought to be *so* alleged, that the issue which may be taken upon them shall consist, (as all issues regularly must), of a *direct affirmative* on one side, and a *direct negative* on the other—which could not be the case, if they were alleged by way of recital: Whereas, facts of the latter class—i. e. all material facts, which, though not in terms denied by the general issue, are yet liable to be contested under it, and which cannot be made the subject of a special traverse—may as well be alleged by way of recital, as in direct and positive terms; because all such facts may always be controverted, *without* being *directly* and *in terms put in issue*. And as it can never be necessary, in pleading to answer the averment of any such fact, by a *direct negative*; it can of course, never be necessary to make the averment in terms of *direct affirmation*.

TO ILLUSTRATE THIS DISTINCTION.—a. In trespass *quare clausum fregit*, or for taking and carrying away the plaintiff's goods, the forcible breaking and entering of the plaintiff's close, in the one case, and the forcible taking and carrying away of his goods, in the other, must be *directly and positively* alleged in the declaration. (v) In trespass for an assault and battery, the act of assaulting and beating must be averred in the same manner. (w) In the same manner also must be al-

(u) As *all* facts, alleged in a complaint, may be denied by the code *answer*; the reasons here stated would not authorize the alleging of *anything* under a 'whereas.'

(v) 1 Lill. Ent. 431, 453; 2 Chitt. Pl. 382, 391, 393, 377.

(w) 1 Lill. Ent. 429, 436, 455; 2 Salk. 636; 2 Chitt. Pl. 367-8.

leged the *conversion* in trover.(x) The *ouster in ejectment*(y) the erection of nuisance in an action for the injury(z) and the *taking* of the cattle or goods, in replevin(a)—the neglect of a bailee, in a special action on the case, by the bailor, for damage occasioned by such neglect(b)—the *being* indebted in debt on simple contract (c) the *permitting of the escape*, in an action against a sheriff for an escape, etc(d) for the acts, or facts, specified in these examples (to which many others, falling within the same rule, might be added) are such as the general issue, in the several cases supposed would *directly and necessarily* deny. This will be very obvious, when it is considered that in no one of these examples, can the fact specified be *admitted* by the defendant *consistently* with the general issue. And as the particular fact, mentioned in each of these examples, is liable to be thus *directly* denied by the general issue; it must be *directly and positively* alleged. In assumpsit also, the *promise* must be stated, in terms direct and positive(e); because the general issue (*non assumpsit*) purports to be a *direct* denial of the promise.

b.—So also in declaring on *specialities*—as a covenant broken, debt on a covenant, or a special declaration on a bond(f)—if the right of action depends on a condition

(x) 1 Lill. Ent. 70; 2 Chitt. Pl. 323, *et ult.*

(y) 2 Chitt. Pl. 395, 402.

(z) 2 Chitt. Pl. 240–1, 331–8.

(a) 2 Lill. Ent. 356, 369; 2 Chitt. Pl. 364–368.

(b) 2 Chitt. Pl. 103–125, 274–5.

(c) 2 Chitt. Pl. 141, 237.

(d) 1 Lill. Ent. 60; 2 Chitt. Pl. 147–151, 299–302.

(e) Chitt. on Bills, tit. *Precedents*, *passim*.

(f) A special declaration on a bond is one, which counts as well on the *condition*, as the penal part, and assigns a breach of the condition. (Bac. Abr. *Pleas*, &c., B. 1; Doct. Pl. 84.)

A speciality does not, strictly speaking, merge or extinguish the debt; but it merges the *remedy* by way of proceeding upon the simple contract. Maule, J., in *Price v. Moulton*, 10 C B. 573.

precedent; *performance* of the condition must be alleged, in terms of direct averment. (g) For as the fact of performance, on the plaintiff's part, is of the *gist* of his action; the defendant must be at liberty in some way to contest it. But as he cannot do this under the plea of *non est factum*—inasmuch as that plea is not adapted to such a defence; he must of course be at liberty to take a special issue upon the plaintiff's allegation of performance, by a *traverse*. That allegation must therefore, be *so* made that an issue, thus taken upon it, may consist of a *direct* affirmative on one side, and a *direct* negative on the other. The same rule holds as to all *material* facts alleged in the declaration, and which *cannot* be controverted under the general issue.

c.—And even in *assumpsit*, in which, (for reasons peculiar to that action) advantage *may* be taken of a condition precedent, under the general issue; performance of such a condition must, nevertheless, be averred in *direct* terms (h): because the defendant may if he so elects, take a special issue upon the fact of performance. Thus if A. promises to pay money to B., in consideration of B.'s *hereafter* delivering certain goods to A. and B. brings *assumpsit* for the money; he must *directly* allege the delivery of the goods according to the agreement. For the delivery of the goods is a condition precedent, and therefore *specially traversable*. So also, if one is bound by his promise to pay the debt of a stranger upon *request*, or upon *notice* given of its amount; a request or notice must, for the same reason, be specially and *directly* alleged in the declaration. (i)

(g) 2 Chitt. Pl. 197, 485-6.

(h) Hob. 106; Cro. Eliz. 201; Com. Dig. *Pleader*, G. 11, C. 69.

(i) Id.; 1 Saund. 32; Com. Dig. *Condition*, L. 11, *Pleader*, 73; 3 Salk. 308; Doug. 21.

Under the Code, *all conditional* agreements would come within the rule; and the *facts* which make a compliance with, or fulfilment of, the condition, must be *directly* alleged: As, if the promise be to

But the *consideration in assumpsit*, though of the *gist* of the action, may, when *executed*, (as in the case of a liability *existing at the time* of the alleged promise), be stated under a 'whereas.' And in this form is the consideration in such cases laid, in the precedents. (*j*) For the consideration is not directly denied by the *terms* of the plea of *non assumpsit*; and cannot be made the subject of a *special traverse* (*k*) because such a traverse would be, in effect, the *general issue informally pleaded*, and therefore inadmissible. There is consequently, according to the foregoing principles, no need of a direct averment, in stating the consideration. As, however, it is of the substance of the cause of action, the defendant is of course, at liberty to deny it: but he must do this, if at all, under the general issue. (*l*)

pay *when able*, the *ability*,—(which under the former rules of pleading, must be *proved*, (3 Esp. Rep. 159; 2 Hen. Bla. 116;)—must be *alleged*, as well as *proved*; and it may be *denied* in the answer, and indeed must be, to have want of ability available to the defendant. So, though in an action to recover the possession of personal property, only an *unlawful detention* need be alleged. Yet if the defendant came into possession thereof by delivery from a wrong doer; a *demand* upon the defendant, and his *refusal* to deliver, are necessary to constitute his detaining an *unlawful* one; and they must be directly alleged. *Fuller v. Lewis*, 13 How. Pr. 219.

(*j*) 1 Ld. Ent. *In assumpsit, passim*; Chitt. on Bills, tit. *Precedents*.

(*k*) Com. Dig. *Pleader*, G. 11, 14; Cro. Eliz. 201; Hob. 106; Hetl. 50; Doug. 21; Bac. Abr. *Pleas*, &c., H. 5.

(*l*) It is true that in *special assumpsit*, (i. e. *assumpsit upon an express promise*), the defendant may, under the general issue, *admit* the promise, without destroying the plea; and still deny or impeach the consideration; or show that the promise has been performed, released, or in any way extinguished. But this appears to be in consequence of an anomaly in the pleadings, in this particular action, or rather, of a *deviation* from the strict original principles of pleading—occasioned by confounding the pleadings, on the part of the defendant, in *special assumpsit*, with those in general or *indebitatus assumpsit*, and thus giving the same meaning and effect to the general issue, in the former as in the latter. (*Vide* 1 Mod. 210; and *post*, GENERAL ISSUE.

d.—Thus also, and for the same reason, the plaintiff's *property* (or his *lawful possession*, which implies a *property*,) in the goods for which trover is brought—his *pos-*

Under the Code, the *consideration* of an indebtedness,—where necessary to be averred *at all*,—must be averred *directly*, and *not* under a 'whereas.' And where the *grounds* of indebtedness are so specially alleged, that the indebtedness *necessarily* follows, as an inference of *fact*; an answer, denying merely the indebtedness, and *not* those *grounds* thereof, would be insufficient; and judgment against the defendant, for the frivolousness of his answer, might be had on motion. *Drake v. Cockroft*, 10 How. Pr. Rep. 377.—Yet the averment of indebtedness would be an averment of *fact*, and not of *law*; the inference being an inference drawn by the law, *upon a matter of fact*.—On the contrary, that the plaintiff '*is entitled*' to the sum of money demanded in his complaint, (*Drake v. Cockroft*) is strictly and properly a conclusion of *law*; and an answer, denying merely that the plaintiff is so entitled, is bad, as denying the *logical conclusion*, which is a legal necessity from premises which are admitted by not being denied.

Where the declaration is upon a simple contract, it is essential that it should show that there was a good and sufficient *consideration* to support the defendant's promise. If no sufficient consideration is alleged, or if the consideration is shown upon the face of it to be illegal, (*Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33,) the contract will appear to be void; and in either case the consideration is bad in substance. *Robertson v. Howard*, 3 C. P. D. 280.

The law is exceedingly strict in requiring that the consideration of a contract shall be truly set forth in a declaration for a breach of it. The difference of a shilling only between the alleged and the actual consideration defeated the plaintiff in the case of *Durston v. Tuthan*, cited in 3 T. R. 67, and recognized as law in 3 M. & S. 175, and in *Cleaves v. Lord*, 3 Gray, 71; *Whitney v. Marks*, 1 Kerr (N. B.) Rep. 179. And see *Curley v. Dean*, 4 Conn. 259; *Tulman v. Fuller*, 13 Mich. 113; *Booz v. Cleveland School Furniture Co.*, 45 App. Div. 593.

It is also necessary that the whole consideration on which the promise depends should be stated; for if any part of an entire consideration, or of a consideration consisting of several things, is omitted, the agreement will be incorrectly alleged. *Symonds v. Carr*, 1 Camp. 361; *Ring v. Roxborough*, 2 C. & J. 418; *King v. Sears*, 2 C. M. & R. 48; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Guthing v. Lynn*, 2 B. & Ad. 232; *Thomas v. Thomas*, 2 Q. B. 851. This im-

session of, or interest in the house or land alleged to be injured, in an action for a nuisance—his lease, in ejectment—his delivery of the goods to the defendant, in a special action on the case, for negligence, against the latter as bailee—(to which various other examples, of a similar kind, might be added)—may respectively be stated in the declaration, under a ‘whereas.’(*m*) For none of these particular facts are *directly* denied, in any of the several cases mentioned, by the plea of *not guilty*; indeed they may respectively be *admitted* by the defendant, *consistently* with that plea. And as a *special* traverse of either of them would be improper, as being an informal *general issue*; it is apparent from what

portant distinction, therefore, exists between the statement of the promise and of the consideration, namely, that the whole of the latter should be alleged; whereas it is sufficient to state so much only of the promise as the defendant is charged with having broken.

The promise and the consideration together constitute the contract.

Where the consideration was executory at the time of the promise, and formed a condition precedent, the execution of it must be alleged.

The consideration must not be alleged as past or executed, because, generally speaking, a past consideration is insufficient to support a promise; but where a contract is set out *in hæc verba*, the past tense may be held to be an apt form of expression for a concurrent act. *Steele v. Hoe*, 14 Q. B. 431, 445; *Payne v. Wilson*, 7 B. & C. 423; *Streeter v. Horlock*, 1 Bing. 34; *Bainbridge v. Wade*, 16 Q. B. 89; *Hoad v. Grace*, 7 H. & N. 494.

If the consideration or the promise or covenant is in the alternative, it must be stated according to the fact. So, also, whenever the covenant or promise is conditional. *Penny v. Porter*, 2 East, 2; *Tate v. Wellings*, 3 T. R. 531; *White v. Wilson*, 2 B. & P. 116; *Heard* *Precedents of Pleadings in Civil Actions*, 16.

[See *Fulton v. Varney*, 117 App. Div. 572, 575, where the court said: “This instrument not being under seal and not being negotiable, the allegation in the complaint that it was executed and delivered ‘for a valuable consideration,’ without in any way setting up the facts showing consideration, is a mere conclusion of law.”

Where by statute every contract in writing imports a consideration, no averment of consideration is necessary. See *Henke v. Eureka Endowment Asso.*, 100 Cal. 429].

(*m*) *Bac. Abr. Pleas, &c.*, B. 4.

has been said before, that there can be no necessity for stating any of them, by way of *direct averment*. They are severally liable, however, to be contested (*n*); but this can be done only in evidence, under the general issue: and if so contested, they must respectively be *proved*; or the plaintiff must fail in his action. It is therefore manifest, that all the facts just specified are in strictness *material*, in the several cases supposed, though usually classed with matters of *inducement*.

THIS DISTINCTION, HOWEVER, IS APPLICABLE ONLY TO THE DECLARATION.—In all the subsequent pleadings, as the plea in bar, replication, etc. the general rule, requiring material facts to be alleged directly and positively admits of no exception (*o*): for as there is no *general issue* to any of these subsequent pleadings (*p*); the only mode, in general of denying any of them, is by precisely traversing some or all of the particular issuable facts alleged in them. Hence the allegation of every such fact must be so framed, as to admit of a *direct negative answer*. (*q*)

MATTER OF INDUCEMENT MAY BE ALLEGED BY WAY OF RECITAL.—It is apparent from the preceding rules that matter of *mere inducement*, in the declaration, may always

(*n*) In the later English ejectment, the real defendant was not indeed permitted, under the *common rule*, to deny the fictitious lease counted upon in the declaration. But this was merely a positive regulation, by *rule of Court*; and did not affect the correctness of the position in the text, so far as regards the *original principles* of the action.

(*o*) Lawes' Pl. 134; *Suit v. Woodhall*, 116 Mass. 548.

(*p*) A replication, containing a *new assignment*, may indeed be answered by the general issue. But a new assignment is in the nature of a new declaration. See *infra*.

(*q*) This section gives the *reason*, why (under the Code) *all* our pleadings require *direct* allegations of fact:—We have *no general issue*. When facts are directly alleged, a *precise traverse* of such as are *essential*, (and of such *only*,) is the best pleading we can have.

—as they are merely *relative*, and referable to no fixed standard—would seem impossible)—it may suffice, perhaps, to present the following general explanation of them.

The First Degree of Certainty in Lord Coke's enumeration, and which he denotes 'certainty to a *common* intent,' is the lowest which the rules of pleading in any instance allow. This degree is sufficient only in pleas in *bar*, *rejoinders*, and such other pleadings, on the part of the *defendant*, as go to the *action*(*w*); but not in *dilatory* pleas.

The Second Degree, or 'certainty to a *certain intent in general*,' is higher than the former, and is required in *counts*, *replications*, and other pleadings on the part of the *plaintiff*; as also in *indictments* and *informations* (*x*): it being deemed reasonable, that such pleadings as assert a *charge*, either criminal or civil, against the adverse party, should be construed with greater strictness, than those which state his *defence* or *excuse*. More precise explanations of these two degrees of certainty have, however, been attempted. Thus, Mr. Justice *Buller* observes, 'By a *common* intent I understand, that when words are used, which will bear a *natural* sense, and also an *artificial* one, or one to be made out by *argument* or *inference*, the *natural* sense shall prevail. It is simply a rule of *construction*, and not of *addition*: *Common* intent cannot *add* to a sentence words which are omitted.'*(y)* But where 'certainty to a *certain intent in general*' is required, if words are used which will bear these two senses, they may be taken, it seems, *either way* against the *party pleading*; though as against the *adverse* party, they can be understood only in their *natural* sense: so that if *either* sense will operate *against* the pleader, his pleading is defective.*(z)* The same distinguished judge again

(*w*) Cowp. 682; Doug. 159; *Dovaston v. Payne*, 2 H. Black. 530.

(*x*) Id.; Co. Litt. 303, a; Com. Dig. *Pleader*, C. 24; 2 Lill. Ab. 377.

(*y*) *Dovaston v. Payne*, 2 H. Black. 530.

(*z*) Co. Litt. 303; Lawes' Pl. 54.

observes, that by the second degree of certainty is meant, 'what, upon a fair and reasonable construction, may be called certain, *without recurring to possible facts, which do not appear*' (a); i. e. without denying, or avoiding by *anticipation*, possible facts, which may operate against him; and on the other hand, without the aid of any supposable facts or circumstances, not alleged by him. (b)

(a) Doug. 159.

[This is the language used also in *State v. Schmitt*, 49 N. J. L. 579; *Spencer v. Southwick*, 9 Johns. 314. And this, it has been held, is the certainty that is required under the code. *Cinc., New Orleans & Texas Pac. R'y Co. v. Third Nat'l Bank*, 1 Ohio Circ. Ct. 199, 205; *Luhrig Coal Co. v. Ludlum*, 69 Ohio St. 311, 314.

"It is commonly said that certainty in pleading includes both precision and particularity; but these words are used in a sense opposed to ambiguity and generality. Reasonable certainty of description is all that can be required, even in reference to written instruments involving such particularity only as would lead to the identification of the property." Somerville, J., in *David v. David's Adm'r.*, 66 Ala. 139, 147, an action of detinue.

In a recent case it was said: "The purpose of a declaration is to inform the defendant of the nature of the demand made upon him. The facts must be stated with sufficient certainty to be understood by the defendant, who has to answer them; by the jury, who have to enquire into their truth; and by the court, which has to render the judgment." *Lane Bros. Co. v. Seakford*, 106 Va. 93. See also *State v. Hayward*, 83 Mo. 299, 309; *Luhrig Coal Co. v. Ludlum*, 69 Ohio St. 311, 314.

Under the code reasonable certainty is all that can be required, and technical omissions should be overlooked. *Gibson & Co. v. Farina Co.*, 2 Disn. 499.

The remedy for uncertainty under the New York Code is to move to make the pleading more definite and certain by amendment. Such an application will not be granted if the court can see the meaning or application of the allegation with reasonable certainty. *Day v. Day*, 98 App. Div. 314, (construing Sec. 546 of the Code of Civil Procedure); *Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181.

An example of a complaint too uncertain to support a judgment may be found, with the comments of the court thereon, in *Giroux Amalgamator Co. v. White*, 21 Oreg. 435.]

(b) 2 Wills. 100; 2 Burr. 1037; 1 Ld. Ray. 400; 1 Saund. 299. See Appendix —.

Certainty of the Third Sort, or 'to a certain intent in every particular,' requires the utmost fullness and *particularity* of statement, as well as the highest attainable accuracy and precision—leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated.(c) The rule, requiring this degree of certainty, is a rule not of 'construction' only, but also of 'addition;' i. e. it requires the pleader, not only to answer fully what is necessary to be answered; but also to *anticipate* and exclude all such supposable matter, as would, if alleged on the opposite side, defeat his plea.(d) This last requisite affords a clear and marked distinction between this, and the two former kinds of certainty. For in those two, nothing more is necessary; in general, than to answer fully the substance of what is *actually affirmed* by the adverse party—or at most to make out a claim or defence, *prima facie* sufficient; without anticipating other matters, not already appearing in the pleadings, but which may possibly be alleged in reply.

This third and highest degree of certainty is required only in such pleas as are *odious* or *unfavorably* regarded in the law: viz. pleas in *estoppel*, and *dilatory* pleas.(e) The former are so regarded because their effect is to preclude the adverse party from averring even *the truth*, if inconsistent with the *estoppel* pleaded(f): and the latter, because their object is to defeat suits upon grounds unconnected with their *merits*.

(c) Co. Litt. 352, b; [*Capwell v. Stpe*, 17 R. I. 475].

(d) Willes, 554; Lawes' Pl. 55.

(e) Bac. Abr. *Pleas*, &c., 1, 11; Cro. Jac. 82; 2 Saund. 209, b; 8 T. R. 161; 3 Ib. 185-6; 5 Ib. 487; Doug. 159; 2 H. Black. 530; Willes, 554; Lawes' Pl. 56, 107, 134; Com. Dig. *Estoppel*, E. 4.

[But a plea calling attention to the abuse of process of the court is not treated as dilatory but as meritorious. *Campbell v. Hudson*, 106 Mich. 523].

(f) Co. Litt. 303, a, 352, b; Lawes' Pl. 55.

It has been said, indeed, that the *highest* degree of certainty is required only in pleas of *estoppel*.^(g) So far as regards pleadings which go, on either side, to the *right of action*, the proposition is undoubtedly correct; and in this limited sense it was, probably, meant to be understood. For it is agreed by all, that no other plea of *that* class, except a plea in *estoppel* requires the highest degree of certainty. It is clear, however, that *dilatory* pleas in general require at least the same certainty as pleas in *estoppel*. If, for example, the defendant is misnamed in the writ or declaration, (as if A. is sued by the name of B.); it is not sufficient for the defendant to allege in his plea, that his name is *not* B.: he must also show in his plea that his true name is A., and must aver that he was, at the time of the writ purchased,^(h) known and called by the latter name; and must, moreover, subjoin a traverse, that he was known or called by the name of B.⁽ⁱ⁾—thus excluding, by *anticipation*, every supposition which could justify the plaintiff in giving him the name of B. This example will illustrate the position, that the rule requiring the highest degree of certainty, is a rule of *addition* as well as construction.

THE CERTAINTY REQUIRED IN PLEADING RELATES CHIEFLY TO PARTIES, TIME, PLACE, AND SUBJECT-MATTER.

1. CERTAINTY AS TO PARTIES.—The parties should be described by their *proper names* ^(k): such a description be-

(g) *Dovaston v. Payne*, 2 H. Black. 530.

(h) 1 Salk. 7; Bac. Abr. *Pleas*, &c., F. 3.

(i) Willes, 554; 1 Lill. Ent. 6; 2 Chitt. Pl. 418; 3 T. R. 185-6; 5 Ib. 487; Com. Dig. *Abatement*, I, 11; Lawes' Pl. 107; *Dovaston v. Payne*, 2 H. Black. 530.

(k) Com. Dig. *Pleader*, C. 17.

As to certainty regarding subject-matter, see *infra*, DECLARATION.

[The rule of the text holds good though the party is doing business under another name. But when this rule is disregarded and the defendant answers on the merits and there is no misapprehension as to the identity or position of the parties, the court will observe

ing necessary for the purpose of identifying them. And no other form of description, it seems, can supply the omission

the Code provision requiring it to disregard any error not affecting the substantial rights of the adverse party. Such provision is addressed as well to the appellate courts as to the courts of original jurisdiction. *Bank of Havana v. Magee*, 20 N. Y. 355, where the plaintiff, an individual, was carrying on business as the "Bank of Havana."

A party is sufficiently described by the name by which he is known. *Eagleston v. Son*, 5 Rob. (N. Y.) 640. And, by statute in some States (as, for example, Iowa), in a suit upon a written instrument, it is sufficient if the plaintiff or the defendant is designated by the name by which he is described in such instrument. *Harris Mfg. Co. v. Marsh*, 49 Ia. 11.

It has been held that the plaintiff's name need not be set out in the caption of the complaint if it appears in the body thereof (*Collins v. Lightle*, 50 Ark. 97); and that if it does not appear in the complaint it may be supplied by referring to the process or other pleading (*Sherrod v. Shirley*, 57 Ind. 13. And so the representative capacity in which the plaintiff sues, if not expressed in the title, may be supplied from the body of the complaint, and, in such a case, the defect is not obnoxious to a demurrer. *Beers v. Shannon*, 73 N. Y. 292; *Smith v. Levinus*, 8 N. Y. 472; *Willets v. Haines*, 96 App. Div. 5.

One Christian name should be used with the surname. *Cooper v. Griffin*, 13 Ind. App. 212, 215; *Enewold v. Olsen*, 39 Neb. 59. And the initial of such given name is not generally enough. *Fisher v. Northrup*, 79 Mich. 287. It is not usually necessary to set out the middle name, or even the initial of the middle name (*Beattie v. National Bank*, 174 Ill. 571); but it may be necessary in order to identify the party (*Diggs v. State*), 49 Ala. 311; *People v. Lake*, 110 N. Y. 61, where, however, it was unnecessary because there was no question as to identity). In Wisconsin it has been held that the use of the initial instead of the full Christian name is sanctioned by long usage. *Zwickey v. Haney*, 63 Wis. 464.

Describing Unknown Parties.—There is a code provision that the defendant may be designated by a fictitious name when the plaintiff is ignorant of his real name and so alleges. But this is not allowable unless such ignorance is real. *Gardner v. Kraft*, 52 How. Pr. 499; *Crandall v. Beach*, 7 How. Pr. 271. And in such a case as soon as the real name is ascertained it must be substituted by amendment. So amending does not change the cause of action. *McCabe v. Doe*, 2 E. D. Smith, 64; *Hancock v. First National Bank*, 93 N. Y. 82.

of their proper names.(1) If therefore two or more persons are sued, as copartners in trade; a description of them, by

Party Appearing in Representative Capacity.—If a party appears in a representative capacity the title of his position or capacity should follow his name with which it should be coupled by the word “as” or some equivalent word. For example, “John Smith, as administrator.” *Lucas v. Pitnam*, 94 Ala. 616; *Litchfield v. Flint*, 104 N. Y. 543; *Bennett v. Whitney*, 94 N. Y. 302; *Stilwell v. Carpenter*, 2 Abb. N. Cas. 238. A failure to insert the word “as,” or some word of equivalent meaning, will result in the word “administrator,” or other word intended to describe the capacity, being treated as mere *descriptio personæ* and surplusage. Under the Code, however, this will not be so if the frame and averments of the complaint show the representative character and that the suit was brought in that character. *Knox v. Met. El. R. Co.*, 58 Hun 517.

The reasons for the rule requiring the character of the plaintiff to appear are thus stated by Mr. Austin Abbott :

- “1. The adverse party is entitled to notice of the questions he is to come prepared to try.
2. The court is to be provided with a definite issue within which to present the case to the jury.
3. The record is to be so expressed that the judgment recovered may show what was determined between the parties, so as to close the controversy to the extent of the definite limits.
4. In the case of representative parties, the last reason is additionally important, for the rights or remedies of beneficiaries who are not parties to the action may be embarrassed by uncertainty as to the scope and effect of the judgment.
5. To these it may be added that the question of capacity is material on the question of costs.” *Stilwell v. Carpenter*, 2 Abb. N. C. 238, 241, note.

Idem Sonans.—A pleading is not defective by reason of the fact that the name of a party is wrongly spelled if the sound is the same to an attentive listener. This is the old doctrine of *idem sonans*. Perhaps the courts are more liberal under the rule that such mis-

(1) [So held where plaintiffs were described as “heirs of M. C.” *Kerlee v. Corpening*, 97 N. C. 330. And see, *Supervisors v. Stimson*, 4 Hill 136, where the naming of plaintiffs “supervisors” was held insufficient].

their partnership *firm*, or the name of their house, without their proper names, seems clearly insufficient.(*m*) For the style of a partnership, being entirely arbitrary, may not contain the proper name of either of its members.(*n*)

But when a *corporation* is a party, the only proper mode of describing it, by its corporate name (*o*): this being the only name or description, by which a body politic is known in law.(*p*) For the law takes no notice of the individual members of a corporation, *as such*, except when the *individual* right of a corporator is the subject in question.(*q*)

spelling is to be considered an immaterial variance if the adverse party is not misled to his prejudice. See, *Jeffries v. Bartlett*, 75 Ga. 230; *Springer v. Hutchinson*, 59 Ill. App. 80; *Hubner v. Reickhoff*, 103 Ia. 368; *Rowe v. Palmer*, 29 Kan. 337; *Com. v. Stone*, 103 Mass. 421; *Miller v. Brenham*, 68 N. Y. 83; *State v. White*, 34 S. C. 59; *Hoffman v. Bircher*, 22 W. Va. 537].

(*m*) 8 T. R. 508.

(*n*) [See *Pollock v. Dunning*, 54 Ind. 115; *Weists & Mall Co. v. Davy*, 28 Neb. 566. A judgment obtained by a partnership is not void because the names of the complaining partners were not set out. Such a defect is waived where the objection is not taken before judgment. *Frisk et al. v. Reigelman*, 75 Wis. 499, 506].

(*o*) 2 Stra. 787; 2 Ld. Ray. 1515; Com. Dig. *Pleader*, C. 18.

(*p*) 1 Black. Com. 474-5.

(*q*) A corporation is an *artificial person*; and its corporate style is its personal name, which must be set out in full and with absolute precision.

It need not be alleged in the declaration against a corporation that it is incorporated, it is sufficient to state the name it is usually known by. *Woolf v. City Steamboat Co.*, 7 C. B. 103.

An incorporated city need not sue in the name of "the inhabitants of the city," but may sue by its name of incorporation. *Lowell v. Morse*, 1 Met. 473. When corporations have been once mentioned by their corporate name in the title of the pleadings, they may be styled "the plaintiffs" or "the defendants" throughout the body thereof.

Corporations are frequently empowered by statute to sue or be sued by the name of some member or officer of the corporation as nominal plaintiff or defendant.

Whether the word "person" in a statute can be treated as including a corporation must depend on a consideration of the object

When the name of either party, having been once introduced in the pleadings, is afterwards repeated, the repetition of it must be accompanied with some such term of reference, as may *identify* the person named in the latter instance, as the one before named—as by the word ‘said,’ ‘aforesaid,’ or some other term of similar import: otherwise the latter description will be ill for want of certainty.(r) But when

of the statute, and of the enactments passed with a view to carry that object into effect. *Pharmaceutical Society v. London Association*, 5 App. Cas. 857.

A company incorporated by public statute will be noticed, and its identity with the one named in the pleadings will be assumed. *MacGregor v. Dover Ry. Co.*, 18 Q. B. 618, 627; *Church v. Imperial Gas Co.*, 6 Ad. & E. 856.

The plea of nul tiel corporation is a good plea in bar. In Bro. Ab. Misnomer, 73, the doctrine is thus laid down: “In an action by a corporation or a natural body, misnomer of one or the other goes only to the writ; but to say that there is no such person in *rerum natura*, or no such body politic, this is in bar; for if he be misnamed, he may have a new writ by the right name; but if there be no such body politic, or such person, then he cannot have an action.” Quoted in *Universalist Society in Newburyport v. Currier*, 3 Met. 417; *Christian Society in Plymouth v. Macomber*, Id. 235, 238.

But although a perpetual disability of the plaintiff may be pleaded in bar, it may also be pleaded in abatement, at the election of the defendant. *Christian Society in Plymouth v. Macomber*, 3 Met. 238, 239, citing Com. Dig. Abatement E. 16; *Bank of Manchester v. Allen*, 11 Vt. 306; *Campbell v. Galbreath*, 5 Watts. 428.

(r) 2 Lev. 207; Com. Dig. Pleader, C. 18.

[Repetition in the body of the complaint of name given in the title is unnecessary. *Cosby v. Powers*, 137 Ind. 694; *Madgett v. Fleenor*, 90 Ind. 517; *Eiseley v. Taggart*, 52 Neb. 658; *Clark v. Haney*, 62 Tex. 511].

In *criminal pleading* the word “said” does not import into a second count and there incorporate a previous description of a person. *The King v. Cheere*, 4 B. & C. 902; 7 D. & R. 461; *Regina v. Waters*, 1 Denison C. C. 356; S. C. 2 Lead. Crim. Cas. 152, 2d ed.; *Regina v. Martin*, 9 C. & P. 215; *Commonwealth v. Sullivan*, 6 Gray, 478, 479.

[If, in an indictment, it is charged that an act was committed “in the parish aforesaid,” this has the same effect as if the descrip-

there are *two* or more antecedent persons to whom, or subjects to which it may be referred, the word 'said,' 'aforesaid,' &c. does not alone import sufficient certainty.(s) In such cases, it is necessary to use the words 'first aforesaid,' 'last aforesaid,' or other terms of equivalent import.(t)

2. CERTAINTY AS TO TIME.—It is a general rule of pleading in personal actions, that the *time* of every traversable fact must be stated(u); i. e. that every such fact must be alleged to have taken place on *some* particular day. This rule seems to be designed merely to promote *certainly* in the pleadings(v): but in a great proportion of the instances

tion of the parish were repeated. *Reg. v. Albert*, 5 Q. B. 37, 41. And see, *State v. Lillard*, 59 Ia. 479.].

One count in an indictment may refer to a former count in describing the defendant as "the said A. B.," to avoid repetition of the description of him in the former; and though the former count be defective, this will not vitiate the other which refers to it. And the law is the same when the jury acquit the defendant on a former count, and find him guilty on that in which he is described only by reference to the former. *Commonwealth v. Clapp*, 10 Gray, 237.

"It is a rule, not of law, but of the grammatical construction of the English language, that words of relation refer to the last antecedent. [*Hinrichsen v. Hinrichsen*, 172 Ill. 462; *Carver v. Carver*, 97 Ind. 497, 502]. On the contrary, the context and the subject-matter may show that something more remote in the collocation of words really is the antecedent." Lord Blackburn in *Ewing v. Ewing*, 8 App. Cas. 825, 826.

(s) 8 T. R. 178; 2 East, 66; Cro. Eliz. 267; Ld. Ray. 888; 1 B. & A. 327; Com. Dig. *Pleader*, C. 18. [But see last preceding note.]

(t) 8 T. R. 178.

'Said,' and 'aforesaid,' so far from being merely useless repetitions, are the very briefest words for giving certainty of reference.

(u) Com. Dig. *Pleader*, C. 19; Yelv. 94.

[*Bond v. Central Bank of Georgia*, 2 Ga. 92; *Barnes v. Mattison*, 5 Barb. 375. So an allegation that certain acts were committed "on divers days and times between" two dates named is obnoxious to a demurrer. *Shorey v. Chandler*, 80 Me. 409. And so it is insufficient to allege that a traversable fact was done "heretofore." *Andrews v. Thayer*, 40 Conn. 156].

(v) [At common law the allegation of time was in general a mere form only, and as allegations of form have been abolished by the

which fall within the rule, very little, if any, practical certainty can result from the observance of it. For where the time is *immaterial*, the pleader is of course not confined in his allegations to the *true time*, nor in his proof to the time alleged. (*w*) He is not confined to the true time in *pleading*, where the time is immaterial, because he is not, in such a case, obliged to show in *evidence* the precise day, on which the fact alleged took place—which might often, indeed, be impossible. And where the day is not material in *evidence*, it cannot be so in *pleading*. (*x*) In such cases, therefore, the adverse party and the court are but little better informed, by the laying of a particular day, of the *actual* time when the fact alleged took place, or to what day the pleader's proof will apply, than if no particular time had been stated in the pleading. Still however, it is in general necessary in point of *form* at least, to lay a day for every traversable fact, whether the day is material or not; and in the declaration especially, this is necessary for the additional reason, that the cause of action must always appear, by the plaintiff's own showing to have accrued before the commencement of the suit. (*y*)

TIME GENERALLY IMMATERIAL.—The precise day on which a material fact alleged in the pleadings took place, is in most cases immaterial, except when the date of a *record*,

Code this allegation may be omitted altogether. *Backus v. Clark*, 1 Kan. 303].

(*w*) Co. Litt. 283, a; 1 Saund. 24. (n. 1.) [A variance to be available must be a disagreement between allegations and proof in some matter essential to the cause of action. *Plumb v. Griffin*, 74 Conn. 132].

(*x*) 4 Stra. 806; 2 Saund. 5, a. (n. 3.)

[So in an action to recover on a stock subscription the complaint is not demurrable for not alleging the date of subscription. *Denny v. Northwestern Christian Union University*, 16 Ind. 220].

(*y*) Bac. Abr. *Pleas*, &c., B. 5, 1; 1 Saund. 24, a. (n. 1.) 291, c. (n. 1.); 2 Ib. 171, n.; 1 Stra. 21. [*Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252; *Haven v. Shaw*, 23 N. J. L. 309].

or other *writing*, or some other fact, the time of which must be *proved* by a written document, is alleged.(z) For as the day is not an independent *fact*, or substantive matter, but a mere circumstance or accompaniment of such matter; it obviously cannot be in its own nature material, and must therefore be made so, if at all, only by the nature of the fact or matter, in connexion with which it is pleaded. If then a tort is stated to have been committed, or a parol contract to have been made, on a particular day; the plaintiff is, in neither case, confined in his proof to the day laid; but may support the allegation, by proving that the wrong was done(a), or the contract made(b), on another day—except that, in each case, the day laid in the declaration, and that proved in evidence, must both be prior to the commencement of the suit. And as the plaintiff is not generally confined, in evidence, to the time stated in the *declaration*; so neither is the defendant, when the time on his part is immaterial, confined to that which is laid in his *plea*.(c) And the same rule obtains throughout the subsequent pleadings. But though a parol contract has, in strictness, no date, and consequently the time of making it is not, *as such*, material; yet if time enters into the *terms* of such a contract, or is involved in any of its essential parts; the true time must be stated, to avoid a *variance*.(d) Hence, in an action on the statute of usury, in which the plaintiff stated a corrupt agree-

(z) 10 Mod. 313; 1 Saund. 24, (n. 1.); 4 T. R. 590.

(a) Co. Litt. 283, a; Cro. Eliz. 32; 1 Chitt. Pl. 383; 1 Saund. 24, (n. 1.); 2 Ib. 5, (n. 3.) 295 (n. 2.)

(b) Stra. 21, 806; 10 Mod. 348; 1 Chitt. Pl. 258; 1 Lev. 110, 111; *Little v. Blunt*, 16 Pick. 365; [*Turner v. Butler*, 126 Mo. 131].

(c) 1 Saund. 24, (n. 1.); 2 Ib. 5, a, b. (n. 3.)

(d) [Where time is a vital element to allege the date as "on or about" is insufficient. *Lockwood v. Bigelow*, 11 Minn. 113, a question of title to real estate. And so when it is alleged that the place of delivery of goods sold under a written contract was changed by a subsequent parol agreement, the date of such subsequent agreement must be alleged. *Wellington v. Milliken*, 82 Me. 58].

ment, made on the 21st of December, 1774, for forbearance from that time to the 23d of December, 1776, it was resolved that proof of an agreement made on the 23d of December, 1774, for forbearance for two years, did not support the declaration.^(e) It is to be observed, however, that this decision was founded not upon any supposition that, in proving a parol contract, the plaintiff is limited to the day on which it is alleged in the declaration to have been *made*; but upon the ground that the agreement proved, *varied in its terms*, from that stated in the declaration: since the time of forbearance, counted upon, was an *essential part of the agreement* itself, and entered necessarily into the *description* of it.

BUT IN PLEADING ANY WRITTEN DOCUMENT—such as a record, specialty, promissory note, bill of exchange, &c., the day, on which it is alleged to bear date is material and must therefore be truly stated ^(f): as there will otherwise be a *variance* between the writing itself, and the description of it in the pleading. Thus in debt on bond, if the plaintiff counts upon a writing obligatory, as bearing date on a certain day, and the instrument is actually dated on a different day; the variance will be fatal to the action. For though the date is strictly no part of the *contract*, it nevertheless enters into the description of the *instrument*: and therefore a misstatement of the date describes a *different deed* from that exhibited in evidence. And the same rule obtains, whenever the time stated in the pleading, on either side, is to be proved

(e) Cowp. 671; *et vide* 4 Esp. Rep. 152; 16 Pick. 365.

(f) 1 Stra. 21; 2 Ib. 806; 10 Mod. 313; 1 T. R. 656; 3 Ib. 531; 1 Lev. 110, 111; *Little v. Blunt*, 16 Pick. 365. [*Manning v. Haas*, 5 Col. 37; *Howland v. Davis*, 40 Mich. 545.

It is sufficient to set the instrument out, since, *prima facie*, it was made at the time and place of date. (*Brown v. Weldon*, 71 Cal. 393), or to allege that it was "made" on a certain day (*Robinson v. Grandy et al.*, 50 Vt. 122.]).

by a *record or written instrument*, referred to in the pleading. (g)

When the date of an instrument is alleged, it is not indispensable to the sufficiency of the pleading, that the time of its *delivery* be stated at all. (h) For the date being stated, and the time of delivery omitted, the instrument will be *intended* to have been delivered on the day of the date. But if the plaintiff, in an action on a specialty, describes it in the *declaration*, as bearing date on a certain day, without averring the time of its *delivery*; he cannot in his *replication* allege that it was delivered on a day *different* from that of its date, as stated in the declaration. (i) For the time of delivery being omitted in the declaration, must be *intended* (as has been suggested already,) to have been the *same* as that of the date (j): and as the day of the date is material; an averment, in the replication, that the delivery was on a *different* day, would be a *departure*.

TIME MAY BE MADE MATERIAL BY LATER PLEADING.—But where time is not, *prima facie*, material, it may sometimes be *made* so by the subsequent pleading of the adverse party. Thus, though upon the *face of the declaration*, the day, on which the cause of action is laid, be immaterial; it may nevertheless in many cases, be rendered material in the *subsequent* pleadings, by the matter alleged in them. (k) Yet whenever the day laid is not, originally, or *prima facie*, material, but is afterwards made so by the pleading of the

(g) This rule is necessary for the further purpose, that the *record* should show the true date; and thus prevent, or be a *bar* to, another suit on the same bond, by giving a different date.

(h) 1 Saund. 291, (n. 1.); Cro. Jac. 420; 2 Ld. Ray. 1538.

(i) 3 Lev. 348; Cro. Eliz. 773.

(j) Cro. Eliz. 773, 890.

(k) 2 Saund. 5, a, b. (n. 3.)

[Thus in an action for personal injuries the allegation of the date of injury may become material by the filing of an answer relying on the statute of limitations. *Fitzgerald v. Scovil Mfg. Co.*, 77 Conn. 528].

adverse party, a deviation from it, (*if necessary*), in any of the subsequent pleadings, is no *departure*.^(l) If therefore the plaintiff in assumpsit lays the promise on a day, which is more than six years before the commencement of the suit, and the defendant pleads the statute of limitations; the plaintiff may reply a promise made *within* six years before the suit was brought.^(m) In this case, though the day, as it appears upon the face of the *declaration*, is not material; the plea nevertheless makes it so, as regards the *subsequent* pleadings, by obliging the plaintiff to allege, in his replication, a promise within six years before the commencement of the suit, for the purpose of taking the case out of the statute. But still, as the day is not, upon the *face of the declaration*, material; the deviation from it, in the replication, is no *departure*. Upon the same principles, if the defendant in an action of trespass, justifies the alleged wrong, under the authority of law, (as in the character of sheriff, acting under legal process,) and lays his justification, either on the same day as that mentioned in the declaration, or on another day; the plaintiff also, on *his* part, may in his replication new-assign the trespass, on a day *different* from that stated in the plea or the declaration.⁽ⁿ⁾ For the justification may be true (since an act *similar* to that stated in the declaration, may have been done, and lawfully done, on the day mentioned in the *plea*); and yet the particular wrong, for which the plaintiff actually seeks redress, may have been committed on a day *different* from that mentioned in the declaration, or

(l) 1 Lev. 110; 1 Salk. 222-3; Stra. 21, 806.

A departure is a deviation from what is *material* in the prior pleadings, on the same side. See *infra*, DEPARTURE.

In New York, since the Revised Statutes took effect, where a deed is *acknowledged*, the presumption is that it was delivered on the day of the *acknowledgment*,—not on that of its *date*, if the days are different. *Elsev v. Metcalf*, 1 Denio, 323.

(m) *Id.*; 16 East 423.

(n) 1 Salk. 222; 1 Freem. 246; 2 Saund. 5, a. b. (n. 3.)

the plea; and at a time when the defendant had no legal authority to do the act in question. And thus the time of the alleged trespass, though not *prima facie* material, is made so by the *plea*. For if the plea be true, it is necessary for the plaintiff—in order to avoid the effect of it, and entitle himself to a recovery—to show, upon the record, a trespass committed at a time different from that covered by the plea. If therefore he were not allowed to vary, in his replication, from the day mentioned in the declaration, he might, (as in the case last before stated), be ousted, by an evasive plea, of the right which the law allows him of laying the trespass, in his declaration, on whatever day he pleases.

JUSTIFICATION IN TRESPASS.—It has long been an established general rule, however, that where the time is *not material* to the defence, and from the nature of the case, the matter of the complaint and defence must have accrued at *one and the same time*, the defendant must, in his plea, *follow* the day laid in the declaration. In other words, that the plea must state the matter of defence, as having accrued on the day mentioned in *the declaration*—(even though that be not the true day)—unless the nature or circumstances of the defence render it *necessary* for the defendant to vary from the day laid in the declaration.^(o) The object of this rule appears to be, to prevent an apparent *discrepancy*, in respect to time, upon the face of the record, where the alleged cause of action, and the defence pleaded actually occurred at one and the same time, and where the defendant is under no *necessity* of laying his defence on a different day from that mentioned in the declaration.

In trespass, therefore, if the defendant pleads a *justification*, he must regularly lay it on the *same* day, on which the trespass is *alleged* to have been done. Nor is he allowed to vary from that day in his plea unless the defence shows, upon

(o) 1 Salk. 222; 1 Saund. 14, 82, (n. 3.); 2 Ib. 5, a. (n. 3.); 1 Chitt. Pl. 509, 517; Com. Dig. *Pleader*, E. 4.

the face of it that it was *necessary* thus to vary.(p) Thus, in trespass for an assault and battery, laid on the first of *January*, but actually committed on a different day—as the first of *February*—if the defendant pleads *son assault demesne*, (i. e. necessary self-defence, against an assault by the *plaintiff*,) both the first assault and the self-defence must be laid in the plea, on the first of *January*—or as the usual form is, ‘on the day and year in the *declaration mentioned*.’(q) For if the justification (which *confesses* the alleged battery,) were laid on the first of *February*; the record would exhibit the apparent incongruity of an act done at one time, and justified at another; or, (which is the same thing,) of one *identical transaction* taking place at *two* different times.

But as the general rule, requiring a plea of justification to follow the day mentioned in the declaration, extends only to cases in which the time is *immaterial*; it follows that a justification, unnecessarily varying from the day laid in the declaration varies only in an *immaterial* point, and is therefore faulty only in *form*; and is consequently good, except on *special demurrer*.(r) When, on the other hand, the justification is such as to render it *necessary* to the defence, that the true time be stated in the plea, the law allows the defendant to vary from the time mentioned in the declaration.(s) And this is always the case, when it is necessary to state the true time, in order to adapt the plea to what is *material* in the defendant’s *proof*. In all such cases, the formal objection, arising out of the apparent discrepancy as to time, between the declaration and the plea, must yield to the more important principle, that each party must be permitted to frame his allegations according to the exigency

(p) *Id.*

(q) *Id.*; 2 Chitt. Pl. 524–533.

(r) Stat. 27 Eliz. c. 5; 1 Saund. 14, (n. 2.); 2 Stra. 694; 2 Salk. 642; 1 Lev. 241. *Vide Demurrer*.

(s) 2 Saund. 5, a. b (n. 3.); 1 Chitt. Pl. 517.

of his case. If the rule were otherwise, the plaintiff, by stating in his declaration any other than the true time, might entirely preclude the defendant from availing himself of a just and legal defence.

In trespass, therefore, if the defence is, that the act complained of was done by the defendant, as a sheriff, or other officer, acting under the authority of *legal process*, which bears date *after* the day mentioned in the declaration, the defendant may—and to render his plea available, must—lay his justification on a day after the date of the process.(s) For if the justification were laid on the day mentioned in the *declaration*, (a day prior to that of the date of the process,) the process would not, in evidence, support the plea. And thus the time becomes material in the *plea*, though it was not so in the *declaration*.

But in such a case, the defendant must, in some form *traverse* the day laid in the declaration,(u) i. e. must deny that he was guilty of the alleged wrong, on *that* day, or on any other day than that mentioned in his *plea*.(v) This traverse is necessary, to make the defence *complete*, or *co-extensive* with the complaint. For as the plaintiff has an unquestionable right to prove the alleged trespass to have been committed on *any* day prior to the date of his writ, and of course, on a day different from that mentioned in the plea; it is manifest, that, without such a traverse, the plea, which applies the justification to a *single* day only, must leave *unanswered* any trespass, which may have been committed on any such *different* day, and which *may* be the very wrong for which the action is brought: upon which supposition, the justification, without the traverse, would furnish no defence as to the particular wrong for which the plaintiff claims a recovery.

(s) 2 Saund. 5, a. b. (n. 3.)

(u) 1 Saund. 82, (n. 3.) 297; 1 Chitt. Pl. 509.

(v) Hob. 104; 1 Chitt. Pl. 534-5; Com. Dig. *Pleader*, G. 1, 2.

It seems to be settled, however, (though upon this point there is some confusion in the books,) that in the cases contemplated by the last preceding rule, a *direct and formal traverse* of the day laid in the declaration is not necessary, if the plea contains the allegation, *quæ est eadem transgressio*; i. e. that the trespass, justified in the plea, is the *same* as that complained of in the declaration.(w) That allegation itself being tantamount to a *traverse* or *denial*, that the trespass was committed on any other day, than that stated in the *plea*. And therefore a formal traverse, super-added to that allegation, is held to be not only unnecessary but *improper*, and of course ill, on special demurrer.(x)

If however, the day stated in the justification is the *same* as that in the declaration, the allegation, *quæ est eadem*, etc., is unnecessary(y): the trespass complained of, and that justified, being in such a case *prima facie identified*, by being laid on the same day; and therefore a traverse, in the plea, of the day laid in the declaration, is improper and ill, in point of form.(z) And if the plaintiff, in this case, relies on proving a trespass done on a *different* day he must make a *new assignment* of it in his replication.(a)

But though, where the time in the declaration is *immaterial*, and the justification is, from necessity, laid at a different time, the plaintiff is at liberty to vary, in his replication, as well from the time laid in his *declaration*, as from that stated in the plea: yet where the day mentioned in the declaration is itself *material*, the plaintiff cannot deviate from it in his replication, without making a *departure*, which

(w) 1 Saund. 14, 298, (p. 2.); 2 Ib. 5, a. (n. 3.); Cro. Car. 228; 2 Stra. 694; 1 Lev. 241; 2 Salk. 642; Cro. Eliz. 705; 1 Bulstr. 138; Yelv. 122-3.

(x) Id.

(y) 2 Saund. 5, a. b. (n. 3.)

(z) Id.; 8 Mod. 30; Fort. 379.

(a) Bull. N. P. 17; Bac. Abr. *Pleas*, &c., L.

would be fatal to his action.(b) Thus, if the plaintiff declares upon a record, bond, covenant, bill of exchange, promissory note, or other written instrument, described in the declaration as bearing date on a given day he is not allowed to assign to the document, in his replication, a *different* date.(c) For as the date mentioned in the declaration, is part of the *description* of the instrument declared upon, the assignment of a different date to the same instrument, in the replication, would be, in effect, the pleading of a *different instrument*, and of course, the substitution of a different *cause of action*, from that stated in the declaration.

But in pleading any matter of discharge, as a release—accord and satisfaction—a prior judgment or award, deciding the matter in controversy—payment, or tender of a pre-existing debt, or any other defence, operating as a discharge or extinguishment of any *prior* liability—the defendant is never required to follow the day mentioned in the declaration.(d) And the rule is the same, whether the day in the *declaration* is material or immaterial, and whether it is the true day, or not. For in pleading a defence of this kind, a deviation from the day mentioned in the declaration, introduces upon the face of the record no such apparent *discrepancy*, in regard to time, as in certain cases before stated, a similar deviation would occasion: since all matter of *discharge* must, from its nature, have accrued *subsequently* to the creation of the duty or liability upon which the action is founded. It is therefore manifest, that in pleading any matter of *discharge*, the defendant not only *may*, but (to make his plea sufficient,) *must*, state the defence as having accrued after the cause of action arose; or, at least, after

(b) 2 Saund. 5, b. (n. 3.); 1 Salk. 222-3; 1 Ld. Ray. 121; 1 Stra. 21; 2 Ib. 806; 1 Lev. 110, 111.

(c) 1 Salk. 222-3; 2 Stra. 806; 2 Saund. 5, b. (n. 3.)

(d) 1 Chlitt. Pl. 517; 2 Burr. 944; 2 Wils. 150, 173; Plowd. 46; 2 Stra. 994; Com. Dig. *Pleader*, E. 6.

the wrong complained of was done, or the contract declared upon, was made.

It may be proper to add, in this connexion, that when the defendant has been discharged by matter of *record*—as a prior judgment—or by a *written instrument*—as a deed of release; he cannot be confined, in his plea, to the time mentioned in the declaration, for an additional reason, viz. the necessity of stating the time of the discharge, so as to conform to the *date* of the record, or instrument. For in these, and similar cases, the date is material, on a principle heretofore stated, viz. that a deviation from it would make a *variance*.

ONE CAUSE OF ACTION.—In most cases, and especially when the declaration contains but *one* count, the cause of action is laid on a *single* day only: in which case, the plaintiff can recover only for the wrongs or acts of some *one* day.(e) For the declaration, in the case supposed claims no recovery, except for what has taken place on *one* day. And if there is in fact but *one* cause of action though differently stated in *different* counts, the same day is usually stated in all the counts. And when there is only *one* count in the declaration, the plaintiff cannot recover for acts or injuries done on *several* days, except in the following cases, and those similar to them(f):—

In an action on the case for a nuisance or disturbance—in which the damage complained of is augmented by the *continuance* of the wrong, the plaintiff is, from the nature of the case, allowed to state the *period* of its continuance, from one given day to another; or, as is the more usual mode, from a certain day named to the commencement of the suit(g):

(e) 2 Salk. 639; 1 Ld. Ray. 240; 2 Ib. 976-7; 2 Chitt. Pl. 367, (n. s.)

(f) Id.

(g) Vide *Precedents* (3 Ld. Ray. 260, 292, 324; Pleas. Assist. 424; 2 Chitt. Pl. 331-342, 354, 429-437).

since the declaration could not otherwise show, nor the plaintiff be permitted to *prove*, the whole *extent* of the injury.

In trespass also, when the plaintiff sues for different wrongs of the same nature, committed by *continuation or repetition*, on several different days, he may recover for all of them, on one count, by including in it as many days, or as long a period of time, as his case may require. (*h*) But in the application of this rule, there is a difference to be observed in the mode of declaring, between the case of trespass *continued or renewed* on several different days; or in other words, between *continued* trespasses of a *permanent* nature, and *repeated* trespasses which are *not* permanent.

When trespasses of one and the same kind, committed on several days, are in their nature capable of *renewal or continuation*, and are renewed or continued from day to day—so that the particular injury done on each particular day, cannot be *distinguished* from what was done on another day—the trespasses are denominated *permanent*. Of this description are trespasses committed by cattle, by trampling down, consuming or destroying, from day to day, the grass, crops or herbage, of any kind, growing upon land. (*i*)

But when each of several trespasses, committed on different days, is *distinct* from the others, and terminating in itself, is *incapable* of continuation or renewal, (in which case the injury, committed on any one day, is supposed to be *distinguishable* from the rest), the trespasses, though all of the same nature, are deemed *not permanent*. Thus, if the defendant has, on each of several different days, felled one or more of the plaintiff's *trees*, or killed several of his *beasts*, or taken and carried away different articles of his personal

(*h*) 2 Salk. 638; 3 Black. Com. 212; Bac. Abr. *Tresp.*, 1, 2.

(*i*) 3 Black. Com. 212; Bac. Abr. *Tresp.*, 1, 2; Ld. Ray. 240, 976; 2 Salk. 638; 2 Roll. Ab. 545; 1 Saund. 24. (n. 1.)

chattels; the trespasses, in either case, are *not* of a permanent nature.(j) And from this distinction between trespasses which are permanent, and those which are not so, there results a difference in the mode of *declaring*, when the action is brought for more than *one* day's trespass.

When the trespasses complained of are all of a *permanent* nature, and are continued on several days, in immediate succession, they may all be laid in one count, with a *continuando* for the whole time—i. e. as having been committed by *continuation*, from one particular day specifically named, to another so named. And if the trespasses, though of a *permanent* nature, were committed on different days, *not* in immediate succession, but with *intervals* of one or more days; they may still be laid with a *continuando*, though not for the *whole* time; but by *continuation*, 'on divers days and times, between' one given day and another.(k)

But if the trespasses alleged are *not* of a permanent nature: they cannot be laid with a *continuando* from one certain day to another; but may be alleged to have been committed, *diversis diebus et vicibus*, ('on divers days and times,') *between* one particular day and another, or between one certain day and the commencement of the suit.(l) These modes of declaring in trespass for several days, in one count, whether with or without a *continuando*, are allowed, to avoid

(j) Ld. Ray. 239; 2 Id., 975; 2 Salk. 638-9; Bac. Abr. *Tresp.*, 1, 2; 1 Saund. 24, (n. 1.); 3 Black. Com. 212.

(k) Bac. Abr. *Tresp.*, B. 2, I. 2; T. Ray. 396; 1 Ld. Ray. 239-240; 2 Chitt. Pl. 367, n. s.; 2 Salk. 638-9; 1 Saund. 23-4, (n. 1.); 3 Black. Com. 212; 1 Sid. 319; Com. Dig. *Tresp.*, B. 2; and *vide Precedents*, 2 Lill. Ent. 444; 2 Chitt. Pl. 367.

[The word "continuing" does not necessarily imply the technical sense of a *continuando*. An action is said to be laid with a *continuando* when the injury is alleged to have been committed by continuation from one day to another or at divers days and times between two days named. *Benson v. Swift*, 2 Mass. 50.]

(l) Id.

the necessity of bringing a separate action, or inserting a separate count, for each day's trespass.(m)

But if trespasses, which, according to the preceding distinctions, do not admit of continuation, are alleged with a *continuando*; the declaration is ill, at least in *form* (n): be cause it must necessarily appear, from the nature of the wrongs alleged, that they *could not*, in legal contemplation, have been committed by continuation, and consequently, that they could not have been done in the *manner* alleged. But the fault is aided by *verdict*.(o) For the *continuando* being void, only *one* day's trespass was *legally proveable* under the declaration; and it must therefore be *intended*, after verdict, that the damages were assessed for no more than *one* day's trespass.(p)

So, also, where the plaintiff declared that the defendants, on a certain day named, 'and on divers other days and times, between' that day and the commencement of the suit, committed *an assault* upon him, the declaration—being specially demurred to,—was adjudged ill(q): *an assault* being one entire and indivisible act, which cannot be continued, or committed at *different* times. But as it is now held, an allegation that the defendant on a certain day, 'and on divers other days and times, between that day and the day of suing forth the writ, *assaulted* the plaintiff,' etc. is good: since one may *assault* another at different times, though *an assault* cannot be committed at different times(r); a distinction, which

(m) 1 Saund. 24, (n. 1.); 1 Roll. Ab. 545. [Richardson v. Northrup, 66 Barb. 85, 87.]

(n) 1 Saund. 24, a. (n. 1.); 1 Ld. Ray. 249; Bac. Abr. Tresp., I, 2; 1 Lev. 210; 2 Salk. 638-9; Esp. Dig. 408.

(o) Id. Vide Benson v. Swift, 2 Mass. 50.

(p) 2 Ld. Ray. 823; 7 Mod. 152; Comb. 427; 1 Freem. 82.

(q) Cowp. 828. And vide 6 East, 391, 395; 1 Saund. 24, a. (n. 1.); 2 Chitt. Pl. 367. (n. s.)

(r) 2 Bos. & P. 425-27; 6 East, 395; 1 Phil. Ev. (2d ed.) 134; Bull. N. P. 86.

must be acknowledged to savor, in some degree of verbal subtlety.

It has been stated already, that when a trespass is laid on a certain *single* day, the plaintiff is at liberty to prove that it was committed on *any one* day, before the commencement of the suit. But when trespasses are laid with a *continuando*, he must—if he attempts to prove trespassing acts on more than *one* day—confine his evidence to the *period* or *some part* of the period, included in the *continuando(s)*; and is not permitted to prove trespasses on *two or more* days which are *not* comprehended in that period. The reason of this rule appears to be, that although the time, as such, is not material; yet the *continuando* is considered as *descriptive* of the alleged trespasses, or at least of the *manner* in which they were committed. And upon this supposition, a deviation, in evidence, from the time stated in the *continuando*, is a deviation from the plaintiff's *description* of the trespasses complained of: whereas when only a *single* day is stated in the declaration, it is not regarded as in any sense *descriptive* of the trespasses alleged; but simply as a formal compliance with the general rule of *certainty*, requiring *some* particular day to be alleged. The same rule, which limits the plaintiff's proof, under a *continuando*, to the time comprehended within it, extends to cases in which several trespasses are laid 'on different days and times' between two different days. The principle of the rule, however, as applied to this latter case, is not altogether so obvious as in the former. (*t*)

(*s*) 2 Salk. 639; Bull. N. P. 86; 1 Saund. 24, a. (n. 1.); Esp. Dig. 417-8; Co. Litt. 283, a.; 2 Chitt. Pl. 367-8, (n. a.); 1 Ib. 358-9; *Gordon v. Jenney*, 16 Mass. 470; 2 Stark. Ev. 356; 3 Ib. 1441, note (1).

(*t*) At common law, in trespass *quare clausum fregit*, several rules were well settled: *First*. If a single trespass upon a single day was relied on, a time must be alleged, but need not be proved. *Second*. In order to enable the plaintiff to prove trespasses on more than one day, it was necessary, if the trespass was in its nature

But although the cause of action be laid, and properly laid, either with a *continuando*, or, 'on divers days and times,' between two certain days; yet if the plaintiff at the trial will, as he may, *waive* the *continuando*, in the former case, or in the latter, his right of recovery, except for a trespass committed on a *single* day; he is at liberty to prove a trespass done on *any one* day before the commencement of the suit. For after such a *waiver*, the declaration will stand as if it had originally alleged but a *single* day.

And where several trespasses are *improperly* laid by *continuation*, or 'on divers days,' etc., and the defendant instead of demurring specially for that cause pleads to the action;

capable of continuance (as where the cattle of the defendant trampled and spoilt the grass of the plaintiff for several days), to allege that it was continued from the day named to another day—which was called alleging the trespass with a *continuando*; or if the trespasses were of a kind which, when once done, were completed and could not be continued (as in the case of cutting down trees), to allege that the defendant committed them on divers days and times, *diversis diebus et vicibus*; and unless the declaration, in one of these forms, showed the intention of the pleader to rely upon more than a single trespass, no more could be given in evidence. *Third*. If a trespass was alleged to have been committed on one day, and thence, either continuously, or on divers days and times, to another day, the plaintiff, if he relied on a single trespass only, was not confined to any particular day, and might prove it to have been done even before the first day alleged; but he was not permitted to give evidence both of a trespass within the time alleged, and of a trespass at another time. Judgment in *Kendall v. Bay State Brick Co.*, 125 Mass. 533, 534; *Pierce v. Pickens*, 16 Id. 470; *Folger v. Fields*, 12 Cush. 95; 1 Wms. Saund. 24, 24 a; 1 Wms. Notes to Saund. 20, 21; *Polkinhorn v. Wright*, 8 Q. B. 197; *Percival v. Stamp*, 9 Exch. 167.

In *Powell v. Bagg*, 15 Gray 507, it was accordingly held at common law, that when a trespass was alleged to have been committed on one day, and thence, either continuously or at divers days and times, to another day, the plaintiff, if he relied on a single trespass, was not confined to any day, but might prove it to have been committed even before the first day alleged; but if he relied on continuous or repeated trespasses, he was limited to the period alleged in the declaration. See *Pierce v. Pickens*, 16 Mass. 470.

the plaintiff may, at the trial, without any *waiver* on his part, be limited, on the defendant's objection, to the proof of a trespass committed on a *single* day. In such a case, no *waiver* by the plaintiff is necessary: for as he had, by the rules of pleading, *no right*, in the case supposed, to state more than one day in one count; he has of course no right, on the trial, to *prove* more than one day's trespass, except by the defendant's consent or acquiescence.

It seems, however, that declaring with a *continuando* is not at this day, usual in England, even when that form of declaring is admissible. The more customary mode of declaring, it is said is to lay the trespasses on a given day, and 'on divers other days and times,' between that and another particular day. (*u*)

ONE STATEMENT OF TIME APPLIED TO SEVERAL ALLEGATIONS.—When the several facts are stated, either in several clauses of an entire sentence, or in several sentences connected by the conjunction 'and,' if the time be stated in only *one* of the different clauses or sentences, it will be applied to each of the facts alleged in the succeeding clauses or sentences thus connected. (*v*) Thus, if the plaintiff, in trespass, declares that the defendant, on such a day, made an assault upon him, and took and carried away such a sum of money; the day stated will be referred, as well to the taking, etc., as to the assault: such being the fair grammatical construction of the language used.

In pleading any negative matter, no time need be alleged (*w*): as where the plaintiff avers that the defendant has *not* paid the debt, or performed the duty in question; or the defendant, that he has *not* done what he covenanted not to do. For no particular day is predicable of that, which has *never* existed. And it may be added, that a negative allega-

(*u*). 1 Saund. 24. (n. 1.)

(*v*) Cro. Jac. 443; Com. Dig. *Pleader*, C. 19; 1 Ld. Ray. 576.

(*w*) Com. Dig. *Pleader*, C. 19; Plowd. 24, a; Lawes' Pl. 58.

tion requires in general *no proof*: the burden of proof lying regularly on that party, who takes the *affirmative* of the issue. (x) To this last remark there is indeed an exception, in one or two particular instances, not material to the present subject. (y)

In real actions also, there is no necessity of alleging any particular day, in the declaration. (z) There would indeed be no propriety or congruity, in doing so. For in actions of this class, the declaration does not, as in personal actions, aver any specific *act or fact*, (occurring at a particular time), as the cause of action; but asserts in substance, only a subsisting *right or title* in the plaintiff or demandant, and an adverse holding or denial of his right by the defendant or tenant. (a)

In ejectment also, it is held unnecessary to lay the *ouster* on any particular day (b): because—to adopt the reason usually assigned—‘so are the precedents.’ It is therefore held sufficient, as regards the time of the *ouster*, that it be stated in general terms as having been committed, *after* the making of the supposed demise, and the plaintiff’s entry under it. (c) Perhaps, however, the reason of the rule may be, that in the English ejectment, the supposed *ouster* was not *traversable*,

(x) 1 T. R. 144, 649; 4 Ib. 33, 381; 5 Ib. 616; Bull. N. P. 297-8.

(y) *Vide* 2 Bl. Rep. 851; Gilb. Ev. 148; Comb. 57; 3 East, 192; 10 Ib. 216; 2 Russ. on Crimes, (2d ed.) 673, 692, note (f).

(z) 2 Salk. 561; Com. Dig. *Pleader*, C. 19; 1 Saund. 286-7.

(a) *Vide Precedents*, 3 Black. Com. App. No. 1, § 6; Lawes’ Pl. App. 212; 3 Chitt. Pl. 620-635.

(b) Cro. Jac. 311, 312; Yelv. 382, a, *note*; 2 Chitt. Pl. 396 (n. r.); Esp. Dig. 445-6.

As to the old action of ejectment, see the judgment of Lord Blackburn in *Bristow v. Cormican*, 3 App. Cas. 661.

[So if by clerical omission the date is left blank the error is not fatal. *First Nat. Bk. v. Roberts*, 9 Mont. 323. An allegation of ouster on a day previous to acquisition of title by the plaintiff is good after verdict. *Coryell v. Cain*, 16 Cal. 567.]

(c) *Woodward v. Brown*, 13 Pet. 1.

and could not in any way be put in *issue*: the real defendant being obliged, under the 'common rule,' to *confess* the *ouster*, as one of the conditions of his being permitted to appear and defend. (d) And the general rule requiring a particular day to be stated in pleading, extends only to *traversable* facts. It is usual, however, in the present forms of declaring in this action, to lay the *ouster* on a particular day. (e)

IMPOSSIBLE DATE WHERE NOT MATERIAL.—If, where time is not material, the pleader states an *impossible* day—as the 30th of February; or a day *future* to that of pleading; or a day *inconsistent* with what he has before stated—(as when in *trover*, the declaration lays the loss of the goods on the *second* day of a certain month, and avers that the defendant 'afterwards,' viz. on the *first* day of the same month, converted them); the effect of the mistake is, in either case, the same as if *no* time whatever had been stated (f): for repugnancy or absurdity, in a point *not material*, being but matter of *form*, will consequently, except on special demurrer, be *rejected as surplusage*—according to the maxim, *utile per inutile non vitiatur*. (g) And the time, in the cases now supposed, being *immaterial*, the mistake is aided, except on special demurrer.

CERTAINTY AS TO PLACE.—The third particular, in which certainty, in pleading, is required, is that of *place*; the discussion of which involves the law of *venue*. Under this head, it is a general rule, that the *place* of every *traversable* fact, stated in the pleadings, must be distinctly alleged (h): or,

(d) 3 Black. Com. App. No. 2. s. 3.

(e) 3 Black. Com. App. No. 2. s. 2; 2 Chitt. Pl. 396-400.

(f) Carth. 389; Com. R. 12; 5 Mod. 286; Com. Dig. *Pleader*, C. 19; 3 M. 5; Stra. 232, 1095; Cro. Jac. 662; 1 Saund. 116, 286; 1 Lev. 195; Vide Yelv. 71, *note* (2); Clayt. 102.

(g) Co. Litt. 303, a; Com. Dig. *Pleader*, Q. 9; Vide Stat. 27, Eliz. c. 5.

(h) Com. Dig. *Pleader*, C. 20; Cro. Eliz. 78, 98; 5 T. R. 620; 1 Stra. 595; Lawes' Pl. 57-8; Bac. Abr. *Venue*, B.; Co. Litt. 303, a.

at least, (as the rule is now understood and applied,) that some certain place must be alleged for every such fact. This is done by designating the *city, town, village, parish* or *hamlet*, together with the *county*, in which the fact is alleged to have occurred; and the place, thus designated, is called the *venue*(*i*): the term, '*venue*,' (*vicinage*,) signifying, in strictness, not the *county* in which the action is brought; but the particular *city, town, parish, hamlet*, etc., in which the fact alleged occurred or is supposed to have occurred, and which is stated as situate in the county named in connexion with it.(*j*) In its present acceptation, however, the word *venue* is most frequently used to comprehend, as well the *county*, as the town, parish or other *vicinage*, in which the fact alleged arose, or is stated to have arisen.(*k*)

But the rule, requiring the laying of a *venue* for traversable facts, though doubtless necessary for the sake of *certainty* in pleading, was, by an ancient principle of the common law, more especially so, for an entirely different reason. For by a general rule of the common law, strictly observed in the ancient practice, and still recognized in *theory*, by legal fiction, every issue in fact, triable by jury, was required to be tried by jurors, not only of the same *county*, but also of the same *venue, vicinage, or immediate neigh-*

(*i*) 3 Black Com. 294, 384; Com. Dig. *Pleader*, C. 20; Bac. Abr. *Venue*, A.

(*j*) *Id.*

(*k*) In New York *place* is required to be alleged truly, in cases where the place, at which the act was done, is material for the purpose of giving the *particular plaintiff* a right of action: as in actions for penalties, by local officers,—as commissioners of excise,—overseers of the poor of a town, &c. The offence must be alleged, (and proved,) to have been committed within the town, &c. But verdict cures the omission. *Pruyn v. Bellis*, 18 How. Pr. 331.

Where an action is on a contract which, by our laws, is illegal; the plaintiff must aver, and prove, the *place* where the contract was made; and that, *there*, it was legal. *Thatcher v. Morris*, 11 N. Y. 437.

borhood, in which the fact to be tried actually took place(*l*): a rule founded on the maxim of the common law, *Maxime Vicini Vicinorum facta præsumuntur scire*, (the transactions of men are presumed to be best known to those of their *immediate neighborhood*). And this regulation made it necessary, that the *true* place of venue should be alleged; because it could not otherwise appear from the pleading, to what particular vicinage the jury-process should go—or in other words—from what vicinage the jury should come. And upon the establishment of nisi prius trials, (which were held in each county of the kingdom), it was also required that every matter of fact, put in issue and triable by *jury*, should be *tried*, as well *in* the county(*m*),

(*l*) Co. Litt. 125, a, b, *in notis*; Yelv. 12, n. 2; Gilb. H. C. P. 70, 83-4; 5 T. R. 620; 3 Black. Com. 359, 384-5; Com. Dig. *Amendment*, H. 1; Lawes' Pl. 27-8; 2 H. Black. 161; Bac. Abr. *Venue*, E.; 5 Mass. 96.

(*m*) To the ancient common-law rule, that every action must be laid in the county, in which the cause of action arose, there appears to have been originally, or at a very early period, an exception in the case of actions founded on *personal contracts*; as in account, debt, and covenant broken. Actions of this kind were allowed to be brought in *any* county, in accordance with the maxim, *debitum et contractus sunt nullius loci*: he who is indebted, being a debtor in all places, or wherever he is. (7 Co. 3, a; Com. Dig. *Action*, N. 12, 6; 1 Stra. 612; Cowp. 180; 3 Black. Com. 384; 1 Saund. 74. (n. 2.) But by the stat. 6 Rich. 2, c. 2, it is enacted, that in 'writs of debt and account, and all other *such* actions,—if in pleas upon the same writ, it shall be *declared* that the contract thereof was made in *another* county' than that in which the writ is brought; the writ shall *abate*. Under this statute, if it appeared *from the record*, that the contract was made in a county, *other* than that in which the action was laid; the judgment was erroneous. 1 Saund. 74. (n. 2.) But to prevent error, and to avoid the inconvenience of rigidly *abating* the writ, the judges, at a subsequent period construed the statute as authorizing them, in their discretion, to *change the venue*, under a rule of practice, by ordering the declaration to be altered, and the action laid, and trial had, in the county in which the cause of action arose. (Bac. Abr. *Actions Local*, &c.; 2 Salk. 670; 3 Black. Com. 294.) This statute, and that of 4 Hen. 4, c. 18, requiring that

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as by a jury of the county and *vicinage*, in which the fact actually arose.(n) Hence it became necessary, for the purpose of *trial* that the *true* place of every traversable fact should be stated in the pleadings: since it could not otherwise be known from the record, in what county the issue ought to be tried.(o)

In the application of this ancient rule, however, a distinction, suggested by general convenience, was soon established between *things local* and *transitory*; and consequently between *local* and *transitory actions*. In *local* actions, the preceding rules regarding locality of trial were still adhered to; while those of a *transitory* nature became, by an arbitrary laying of the venue, triable in any county, in which the venue was laid in *the pleadings*.(p) Hence in *local* actions, the place has ever been, and still is, material; and must therefore be laid according to the truth.(g) But in actions *transitory*, the ancient rule as to the locality of actions and trials, is now, and has long been, entirely disregarded, or rather *evaded*, to every purpose except the mere *form of laying some venue*, and the power of the court, under special circumstances, to *change* it, i. e. to change the county, on motion. In *transitory* actions, therefore the plaintiff is at liberty to lay the venue in what county he pleases.(r)

attorneys 'make no suit in a *foreign* county,' are considered as the source of the authority, which judges now exercise, of *changing venues* in *transitory* actions.

(n) 2 H. Black. 161; Co. Litt. 125, a. b.; Bac. Abr. *Venue*, E.; Gilb. H. C. P. 70, 83-4; 3 Black. Com. 359, 384-5; Bac. Abr. *Actions Local*, &c.

(o) *Id.*; Cowp. 176; 2 H. Black. 160-1.

(p) 7 Co. 3; Gilb. H. C. P. 84-5; Cowp. 176-7; 3 Black. Com. 294.

(g) Com. Dig. *Action*, N. 1, 2, 3; *Id.* *Pleader*, S. 15; 3 Black. Com. 294.

(r) 3 Black. Com. 294; Bac. Abr. *Actions Local*, &c., B.; Com. Dig. *Pleader*, S. 9; Cowp. 177; 1 Saund. 74, (n. 2.); Gilb. H. C. P. 89-90. [But the place must be alleged with certainty whenever it is material (*Sage v. Hawley*, 16 Conn. 106), as when the validity

LOCAL AND TRANSITORY ACTIONS.—It becomes necessary, therefore, to a correct understanding of the modern law of

of a contract is in question (*Thatcher v. Morris*, 11 N. Y. 437). See also, *Gunther v. Draubauer*, 86 Md. 1; *Little v. Chi. St. P. M. & O. Ry. Co.*, 65 Minn. 48; *Eingartner v. The Illinois Steel Co.*, 94 Wis. 70; *McKenna v. Fisk*, 1 How. 241.

In *McKenna v. Fisk*, 1 How. 241, 249, Justice Wayne said :

"But it is an established rule, that in transitory actions a venue is only necessary to be laid to give a place for trial. Such a venue is indispensable, for without it it would not appear in what county the trial was to take place, nor could a jury be summoned to try the issue. Com. Dig. *Pleader*, C. 20; 1 Cowp. 176, 177; 5 Term Rep. 620; 2 Lev. 227; Bacon's *Ab. Venue*, C.; 3 Term Rep. 387. The venue for trial is a legal fiction, devised for the furtherance of justice, and cannot be traversed. So that if A. becomes indebted to B., or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A. in England, if he is there found, upon a declaration alleging a cause of action to have occurred in an English county, in which the action is laid, without taking notice of the foreign place. 1 Cowp. 177, 179. Lord Mansfield said: But as to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. *Mostyn v. Fabrigas*, 1 Cowp. 161.

"Crimes are, in their nature, local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei*. And though in all declarations of trespass it is laid down *contra pacem regis*, yet that is only matter of form and not traversable. The same doctrine in respect to local and transitory actions has been repeatedly affirmed in the courts of the States of this Union.

"It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. And it also appears from the authorities which have been cited, that in a transitory action of trespass, it is only necessary to lay a venue for a place of trial, and that such venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought."].

venues, to ascertain in the first place what actions are *local*, and what *transitory*.

A *local* action is one, which must still be laid in the county, in which the cause of action actually arose.

A *transitory* action may be laid in any county, which the plaintiff may prefer.^(s) The present locality of actions is founded, in some cases, on common-law principles, and in others, on positive enactments of statute law.^(t)

(s) Bac. Abr. *Actions Local*, &c. (a.); [*Stout v. Wood*, 1 Blkf. 70 (an action for slander); *McLeod v. Railroad Company*, 58 Vt. 727.

An action was to be deemed transitory when the transactions upon which it was founded might have taken place anywhere. but local when the cause of action was in its nature necessarily local. *Mott v. Coddington*, 1 Rob. 267, 273, citing *Livingston v. Jefferson*, 1 Brock. 203; *Watts v. Kinney*, 6 Hill 82. The test as to whether an action was transitory or local was not, as a general proposition, the subject causing the injury but the object suffering the injury. *McLeod v. Railroad Company*, 58 Vt. 727, which rested transitory actions upon the rule of international comity that every nation may rightfully exercise jurisdiction over all persons within its limits in respect to matters purely personal; and this independent of whether the right arises from statute or is a common law right. And see *Dennick v. Central R. R. Co.*, 103 U. S. 111].

(t) [In England the distinction between local and transitory actions was virtually abolished by the Judicature Act. There, if the plaintiff does not name in his statement of claim the place where he proposes to try the action it will be tried in Middlesex.

And in the United States the question whether the action is local or transitory is usually determined by statute. In Ohio this division of actions has never been recognized. *Railroad Co. v. Morey*, 47 Ohio St. 207. In Mississippi the only local actions are ejectment and trespass corresponding to trespass *quare clausum fregit*. *Archibald v. Miss. & Tenn. R. R. Co.*, 66 Miss. 424.

So the codes have largely done away with the distinction in the former sense of these terms. As was said in *Houck v. Lasker*, 17 How. Pr. 520, 522: "No action is strictly local in the sense in which the term is used at the common law." Except where all parties are non-residents of the State, "each action has some county in which it is properly triable. Sometimes this is determined by the situation of the subject of the action. * * * Sometimes it is determined by the place where the cause of action arose. * * * In other cases the proper county is determined by the residence of the

Of those which continue local by the *common law*, are

a. *All actions in which the subject or thing to be recovered, is in its nature local.* Of this class are all *real ac-*

parties. * * * And yet every action is so far transitory that the plaintiff may, with impunity, lay his venue in any county in the State. If the proper county has not been selected, the defendant has the right to have the place of trial changed."

In New York this subject is regulated by sections 982, 983, 984 of the Code of Civil Procedure. Sections 982 and 983 govern the actions formerly known as local actions. Section 982 covers actions relating to real property, including trespass, and applies to both legal and equitable actions affecting the title to land. *Litchfield v. International Paper Co.*, 41 App. Div. 446. The actions covered by this section are governed by the location of the subject-matter, though the title to personal property is also involved. *Hall v. Gilman*, 77 App. Div. 464. This section governs ejectment, partition, action for dower, foreclosure suits, action to quit title, for waste, for a nuisance, to compel conveyance of property, and every other action to recover or procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate or interest in real property or in a chattel real. The fact that a question regarding title may have to be passed upon does not bring the case of itself within this section. So an action for money damages for breach of contract to buy real estate is not within the section. *Maier v. Rebstock*, 68 App. Div. 481; *Hogg v. Mack*, 53 Hun 463.

Section 983 governs actions to recover a penalty or forfeiture imposed by statute (*Dyman v. Grammercy Club*, 28 App. Div. 30; *Ithaca Fire Dept. v. Beecher*, 99 N. Y. 429); actions against public officers, as such, for wrongful acts or omissions to act (*Galligan v. Hornthal*, 71 Hun 18; *McConihe v. Palmer*, 76 Hun 116; and actions to recover chattels distrained or damages therefor.

The decisions are not in harmony as to what constitutes "residence" under this section. *Bischoff v. Bischoff*, 88 App. Div. 126 (holding that a party may have several residences distinct from his domicile, and that the suit is properly brought in the county where one of these is situated); *Washington v. Thomas*, 103 App. Div. 423 (holding "residence" to be almost synonymous with "domicil," and to mean a permanent home "as distinguished from a mere stopping place for the transaction of business or pleasure"). The latter ruling seems to be in consonance with reason.

Section 984 relates to other actions than those specially provided for in secs. 982, 983, and an action governed by this section must be brought in the county where one of the parties to the record (*Lane*

tions—actions of *waste*, when brought on the statute of *Gloucester*, (6 Edw. 1.), to recover, together with damages, the *locus in quo*, or place wasted—and actions of *ejectment*.(e) All these are local, because they are brought to recover the seisin or possession of lands or tenements, which are local subjects. And if the place—as the parish, etc., where the land, or subject in demand, is situated—be misstated, the plaintiff will be liable to a nonsuit (f), by reason of the mis-description of the *subject-matter* of the suit: because the place enters into the description of it.

b. *Various actions*, which do not seek the direct *recovery* of lands or tenements, are also local, by the common law; because they *arise out* of some local subject or the violation of some local right or interest. Thus the action of *quare impedit* is local (g); inasmuch as the *benefice*, in the right of presentation to which the plaintiff complains of being

v. Boehlowitz, 77 App. Div. 171), has his permanent residence (*Washington v. Thomas*, 103 App. Div. 423), at the commencement of the action (*Burke v. Frenkel*, 97 App. Div. 19). This class includes actions to compel the assignment of a mortgage (*Yates Co. Nat. Bk. v. Blake*, 43 Hun 162), actions relating to real property in another State (*Shepard v. Squire*, 76 Hun 598), and all actions upon contracts relating to real property (*Mott v. Coddington*, 1 Rob. 267). As between a domestic, and a foreign corporation doing business in the State, the residence of the former controls. (*Remington & Sherman Co. v. Niagara Bank*, 54 App. Div. 358.)

It is generally held that a corporation resides where its principal place of business is, but—and this is especially true as to railroad companies (*St. Louis & C. R. R. Co. v. Postal Teleg. Co.*, 173 Ill. 508, 528; *Slavens v. So. Pac. R. Co.*, 51 Mo. 308; *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492)—it is frequently provided that a corporation may be sued in any county where it does business, or where it has an agent upon whom process can be served (*Sullivan v. Sullivan Timber Co.*, 103 Ala. 371; *Central of Georgia R. Co. v. State*, 104 Ga. 831)].

(e) *Id.* Com. Dig. *Action*, N. 1; 7 Co. 2, b.; 2 Black. Rep. 1070; Cowp. 176; 7 T. R. 588; 4 Ib. 504.

(f) *Str.* 595; 3 Lev. 334.

(g) 7 Co. 3, a.; Com. Dig. *Action*, N. 4; 1 Chitt. Pl. 271.

obstructed, is so. Within this class of cases are also many actions, in which only *pecuniary* damages are recoverable. Such are the *common-law* action of *waste* and trespass *quare clausum fregit* (*h*): as likewise trespass on the case for injuries affecting things *real*—as for *nuisances* to houses or lands—*disturbance* of right of way, or of common—*obstruction* or *diversion* of ancient water-courses, etc. (*i*)

If however, a tortious act, committed in *one* county, occasions damage to land or any other local subject, situate in *another*; an action for the injury thus occasioned, may be laid in either of the two counties, at the choice of the party injured. (*j*) Thus, if by the diversion or obstruction of a water-course, in the county of A., damage is done to lands, mills or other real property in the county of B., the party injured may lay his action in either of those two counties. (*k*)

No action will lie, in any one *sovereign state*, for the recovery of lands or tenements lying in another (*m*): since no common-law court has *jurisdiction* of local causes, arising within a foreign sovereignty. Indeed a judgment, if given in such a case would be utterly nugatory. For as legal process, issuing from a court of even the highest jurisdiction, is of no authority in any other country or state, than that in which it was issued: a judgment in the case supposed, could by no possibility be enforced. (*n*) Nor in general can any

(*h*) Bac. Abr. *Actions Local*, &c., A. (a); Cowp. 180; 4 T. R. 503; 6 East, 598-9; [*Niles v. Howe*, 57 Vt. 391].

(*i*) Com. Dig. *Action*, n. 4; 7 Co. 2, b.; 2 East, 498-9; 1 Chitt. Pl. 271.

(*j*) 7 Co. 2, b.; Co. Litt. 54, a; Com. Dig. *Action*, N. 3, 11; 2 T. R. 241; 7 Ib. 583; 3 Stark. Ev. 1650.

(*k*) This is not the rule in New York.—The Code § [982] confines the venue to the county where the *subject of the action*,—(the real property injured,)—is situated.

(*m*) Bac. Abr. *Actions Local*, &c., A. (a); Cowp. 176; 1 Chitt. Pl. 269.

(*n*) These remarks, however, are not practically applicable in their full extent, to the jurisdiction and decrees of courts of *equity*.

personal action be maintained, in one sovereign state, for a trespass, nuisance, or other injury to *real* property, lying in another(o): such actions being local, (as already stated,) because they arise out of *local subjects*.

But it has been held that this last rule admits of an exception, where a *local* cause of action, requiring a reparation in *damages* only, arises in a foreign country, in which there are *no regular courts of judicature*, and in which, of course, no legal remedy can be obtained.(p) In such cases, this exception has been allowed in some instances, from *necessity*, to prevent a failure of justice. And as the judgment, in this class of cases, is for *damages* only; there is indeed no practical difficulty in enforcing it—as there would be, if the action were brought for the recovery of a specific *local subject*, situated in a foreign country. Thus where certain houses, erected by the plaintiff on the coast of *Nova Scotia*, had been illegally demolished by the defendant, at a time when no regular administration of justice had been established in that province, and an action of trespass for that injury was brought in the English court of B. R., Lord Mansfield held the action to be maintainable.(q) But this distinction appears to be now overruled.(r)

The action of *replevin* also, though it lies for damages only, and does not arise directly out of the violation of any local right, is nevertheless *local*.(s) The reason of its lo-

For these courts by their power of acting *in personam*, when the parties are within the reach of their process, can in many cases indirectly enforce rights to *real property*, situated in foreign countries. 1 Atk. 19; 2 Ves. 204, 447, 454; Mitt. Pl. 184; 1 Fonbl. Eq. 31; 6 Cranch, 157.

(o) 1 Stra. 646; 2 Black. Rep. 1070; Cowp. 176; 4 T. R. 50; 7 Ib. 587; 6 East, 598-9.

(p) Cowp. 180-1.

(q) Cowp. 180-1; 4 T. R. 503-4.

(r) 4 T. R. 503-4.

(s) 1 Saund. 347, (n. 1.); Hob. 16; Willes, 478; 1 Stra. 507-8; 2 Wils. 354; 1 Chitt. Pl. 161; 2 Ib. 364, (n. c. & e.) [*McLeod v. Railroad Company*, 58 Vt. 727.]

cality—(a reason which applies to no other action for injuries of *personal* chattels)—appears to be the necessity of giving a *local description* of the taking complained of. For in declaring in replevin, it is necessary to describe, and to describe truly, the *locus in quo*—i. e. the close, house or common, in which the cattle or goods in question were taken by the defendant (*t*): and as the necessity of alleging the true *place* of caption involves the necessity of laying the true *town, parish* or *bill*, and of course the true county; the venue and county as well as the close, &c, are consequently *material* (*u*), and the action is of necessity local. If however replevin lies, by the common law, only for goods *distrained*; there would seem to be another and more fundamental reason for its locality, viz. that the *right of distress*, which the action is intended to contest, is at common law always local(*v*)

But *personal* actions, that is to say, actions which seek nothing more than the recovery of *money*, or *personal* chattels of any kind, are in most cases *transitory*, whether they sound in tort or in contract (*w*): because actions of this class are, in most instances, founded on the violation of rights which, in contemplation of law, have no *locality*. And it will be found true, as a general position, that actions *ex delicto*, in which *mere personality* is alone recoverable, are, by the common law, *transitory*—except when they are founded upon, or

(*t*) Id.; Yelv. 185, (n. 1); 10 Johns. 53.

(*u*) 1 Saund. 347, (n. 1.); Cro. Eliz. 896; Carth. 186; Willes, 478; 1 Stra. 507-8; 2 Mod. 199.

(*v*) In New York it is not necessary to allege, in replevin,—(or, as now called, an action to recover the possession of personal property;—the *place* of the taking, or any *taking*:—*Unlawful detention* is all that need be alleged. It is not clear, that under the Code, a *place* of detention need be alleged, in all cases. But where the property has been, for any cause, *distrained*, the *taking* should be alleged. And as, then, the action is *local*, *place* must be alleged. [See §§ 983, 1721, 1724].

(*w*) Com. Dig. *Action*, N. 12; 1 Chitt. Pl. 273.

arise out of, some *local* subject.(x) Thus actions for injuries to the *person*, or to *personal* chattels—as for *assault* and *battery*, *false imprisonment*, *slandorous words*, *libel*, and *malicious prosecution* (y)—*trespass* for taking away or injuring *personal chattels* (z), *trover*, *trespass on the case* for *escapes*, *false returns*, *deceit* in the sale of goods, etc., are in general *transitory* (a); and may consequently be laid in any county, even though the cause of action arose within a *foreign* jurisdiction.(b)

In the case of *Mostyn v. Fabrigas* (c), Lord *Mansfield* in-

(x) *Com. Dig. Action*, N. 12; *Co. Litt.* 282; *Cowp.* 161; 1 T. R. 571; 2 Black. 1058; 2 Chitt. Pl. 242. (n. p.)

(y) *Id.*

(z) The action for a *false return* is here called *transitory*, in pursuance of reputable authority, *Com. D. Action*, No. 12; *Bac. Abr. Actions Local, &c.*, A.; 1 *Selw. Pract.* 244; 2 Chitt. Pl. 303, (n.); but from a collation of the different opinions in the books, it appears to be laid, either in the county, in which the return was made, or in that, in which the record remains; *but in no other.* 12 Mod. 408, 515; *Hob.* 209; 1 *Brownl.* 12; 1 *Sid.* 218-9; *Bull. N. P.* 46, (or 64); *Holt.* 170; 1 *East*, 115. (n.)

(a) 2 *Salk.* 670; 12 Mod. 408; *Com. Dig. Action*, N. 12; *Sayer*, 54; 1 *Wills.* 336; 1 *East*, 114; *Cro. Car.* 444; 9 *Johns.* 67.

(b) *Com. Dig. Action*, N. 12; *Cowp.* 161; 2 Black. Rep. 1058; 4 *East*, 162-3. As to a right of action, *created by a New York statute*—where there was by the common law no remedy;—(as by our statute giving an action to the representatives of a deceased person, killed by negligence, —c.)—it has been held that, where the negligent act was *done out of* this state, and within a foreign jurisdiction; though the party killed were a resident of this state, and his representatives were also; they cannot, in our courts, maintain the action, although by service of process within our jurisdiction our court has obtained jurisdiction of the *person* of the defendant. *When, and where, done*, the act gave no right of action under *our statute*: though the *common law* of the foreign jurisdiction would not be presumed to differ from ours. *Beach v. Steamboat Co.*, 18 *How. Pr.* 335.

(c) *Cowp.* 165, 176. The doctrine of venues is fully and elaborately stated in the judgment of Lord Mansfield, C. J., in this case and in the notes thereto, 1 *Smith Lead. Cas.* 8th Am. ed. 1027, and in 1 *Wms. Saund.* 6th ed. 74 (2); 1 *Wms. Notes to Saund.* 96. [And see *McKenna v. Fisk*, 1 *How.* 241; *Livingston v. Jefferson*, 1 *Brock.* 203;

deed suggested a doubt, whether trespass for an *assault and battery*, committed out of the realm of England, would lie in the courts of Westminster; because as every such injury involves a *breach of the peace*, it must be alleged to have been committed against the *peace of the king*; and a breach of the peace, considered as a *public wrong* is confessedly *local*. There appears, however, no sufficient reason for the doubt here suggested. For the wrong, considered as a *civil injury*, is clearly transitory; and in the subsequent case of *Rafael v. Verelst (d)*, in which the point in question directly arose, it was held by the court of Common Pleas, that the allegation, '*contra pacem Domini Regis*,' was not traversable in such an action; and that the action, then before the court, which was brought for an assault, battery and false imprisonment, committed in the dominions of a foreign sovereign prince, was well laid in an English county.

Actions *ex contractu* also, as has been suggested already, are in general transitory, by the common law: for '*debitum et contractus sunt nullis loci*'(e)—the foundation of which maxim doubtless is, that the *causes* of this class of actions have, in most cases, no natural locality, and therefore follow the person of the defendant. Hence the actions of *debt*, *covenant broken*, *account*, and *assumpsit*, may in general be laid in *any* county.(f) And the rule is the same even though the contract were made, and by its terms to be performed, in a *foreign country*.(g)

But debt on *judgment* is local, by the common law, and must be laid in the county in which the record of the judg-

McLeod v. Railroad Co. 58 Vt. 727; *Little v. Chi. St. P. & Mpls. O. R. Co.*, 65 Minn. 48].

(d) 2 Black. Rep. 1058.

(e) 7 Co. 3, a.; Com. Dig. *Action*, N. 12; Tidd. 543-6; 3 Black. Com. 384; 1 Stra. 612; Cowp. 180; 1 Saund. 74. (n. 2.)

(f) Id.

(g) Com. Dig. *Action*, N. 12; 2 Salk. 660; Latch. 4; 1 Saund. 74, 241. b; Cowp. 180; 1 Stra. 612; 2 Ld. Ray. 1532; 1 Chitt. Pl. 273.

c. Upon the same principles, the action of covenant broken, brought by the *assignee* of the lessee, against the *assignee* of the lessor, is by the common law, *local(o)*: for the action, which is given by the *common* law, between these parties, is founded on privity of *estate*. So also on the other hand, debt or covenant broken, brought *by* the assignee of the lessor, *against* the assignee of the lessee, is *local(p)*: for the statute 32 Hen. 8, c. 34, which in this latter instance gives the action, makes it local, by giving to the *assignee* of the lessor, 'the *same* remedy, by action,' as the *lessor himself* has, by the *common* law. And the *lessor's* remedy, by the common law, against the assignee of the lease, being local, (as stated in the last section); that of the lessor's *assignee* is, in the construction of this act, held to be of course local.

d. The action of *debt*, (as for rent arrear), by the *assignee* of the lessor, against the *lessee*, is also local by the common law.(*q*) For the rent being incident to the *reversion*, and the lessee being in the receipt of the issues and profits of the land, out of which it arises; there consequently exists, between these parties, a privity of *estate*: and the action being founded upon *that* privity—(for the privity of *contract*, between the original parties to the lease, is destroyed by the *assignment* of the reversion)—is consequently *local*. And it is here observable, that the *devisee* of the reversion is considered and treated as the *assignee* of the lessor, within the three last rules: the devise being, in legal effect, a *testamentary assignment* of the reversion. And by parity of reason, the devisee of the term is in law the *assignee* of the *lessee*.

e. But the action of *covenant broken* brought by the

(o) 5 Co. 17. a; 1 Saund. 241. c. (n. 6.); 1 Chitt. Pl. 276.

(p) 1 Saund. 241. c. (n. 6.); 1 Salk. 80; 7 T. R. 583; Carth. 182; 2 East. 580; 1 Wils. 165; 3 Mod. 338; 4 Ib. 81; Bac. Abr. *Covenant*, E. 6; Ib. *Actions Local*, etc. A. (a.)

(q) 3 Co. 52 b; 1 Saund. 241. c. (n. 6.); 1 Wils. 165; 3 Mod. 338; 4 Ib. 81.

assignee of the lessor against the *lessee*, or *vice versa*, upon an *express* covenant contained in the lease, and running with the land, is made transitory, by the operation of the statute 32 Hen. 8. c. 34.(r) For the purpose of explaining this proposition, it may be observed that the action of covenant broken, upon *express* covenants, being founded only on privity of *contract*, will not lie, at *common law*, between the *assignees* of the lessor and those of the lessee; because *that* privity does not exist between them. But the statute above mentioned expressly extends 'the *same remedy*' upon such covenants, to and against the *assignees* of lessors and lessees, as lessors and lessees themselves had by the *common law*(s); and according to the construction given to the statute, the remedy afforded by it, to and against assignees, is to be pursued in 'the *same manner*' in which the common law gave it to and against their respective *assignors*, (the original *lessors* and *lessees*). And therefore, as actions of covenant broken, between *lessors* and *lessees*, are by the common law *transitory*; it follows that actions, on express covenant between their respective *assignees*, are transitory by virtue of the above statute. And yet, as has been before shown, *debt* by the assignee of the lessor, against the lessee, is local: the action being given by the *common law*, and founded on privity *estate*.

f. So also, debt or covenant broken for rent, brought by the lessor, his personal representative or assignee, against the *executor* or *administrator* of the lessee, charging him for rent accruing, *after the lessee's death*, is *local*.(t) For as the personal representative of the lessee of a term for years is

(r) Bac. Abr. *Actions Local*, etc. A. (a.) *Covenant*, E. 6; 1 Saund. 241, b. (n. 6.); Cro. Car. 183; 1 Lev. 259; 3 T. R. 401-2; 1 Wils. 165; 1 Vent. 10; 2 Keb. 439, 448, 468, 492.—*Cont.* 2 Show. 200; Com. Dig. *Actions*, N. 4.

(s) Bac. Abr. *Covenant*, E. 6.

(t) Bac. Abr. *Actions Local*, etc., (a.) A.; 3 Co. 24; Com. Dig. *Actions*, N. 4; 2 Lev. 80; Gilb. H. C. P. 91.

chargeable, during his own possession, as *assignee* of the lease; he is, in this latter capacity, *privity in estate* to the lessor: and therefore, if the action is brought by the *lessor* or his representatives, (in which case the remedy is given by the *common law*); it is local, as being founded on privity of *estate*. And if the action is brought by the lessor's *assignee*; the statute 32 Hen. 8, which gives him the remedy, (for the *common law* give none, against the *assignee* of the lease), makes it local, by its own provisions, as before stated.

g. On the other hand, if the executors or administrators of the lessee, in either of the above cases, are charged *as the representatives* of the lessee, and not *as assignees* of the term, (as where they are sued for rent accruing during the *lessee's life*); the action is transitory.(u) For in such a case they are liable, not by reason of any *interest* of their own in the term, and therefore not upon privity of *estate*; but upon privity of *contract*, devolving upon them from the lessee whom they represent.

IT APPEARS, from the preceding distinctions, that where an action, founded on a lease, is given by the *common law*, if an *assignee* of the reversion, or of the term, is party to the suit, it is *local*: since in all such cases, the action is founded on privity of *estate*: but that where the action is given by *statute*, it may be either local or transitory, as the fair construction of the statute may appear to warrant.

ASSUMPSIT FOR USE AND OCCUPATION, though substantially an action for rent, issuing out of a *real* subject, is not, by the law, considered as such and is therefore *transitory*(v): for the plaintiff's *title* being immaterial, (w) the legal liability of the defendant is considered as a merely *personal*

(u) 3 Co. 24; Bac. Abr. *Actions Local*, etc. A. (a.); Latch, 262. 271.

(v) 6 T. R. 62; 6 East, 348; 2 Chitt. Pl. 8, (n. c.) 174, (n. c.)

(w) Sayer, 13; 1 Wills. 314; 2 Ib. 208; 2 Chitt. Pl. 9, (n. c.)

duty, partaking no more of a *local* quality, than a liability arising from goods sold, labor done, or money lent.

But though this action is in its nature transitory, and though it is therefore *unnecessary*, in declaring, to state the *place* where the land occupied is situated (*x*); yet if the declaration *does*, though unnecessarily, describe the land as lying in a particular place—not by way of *venue* for the promise, but of *local description*;—the place, thus stated, must be the *true* one, or the plaintiff will be liable to a nonsuit. (*y*) For though the *venue*, properly so called—i. e. the place where the contract is alleged to have been made—is immaterial, (the action being transitory): yet the place named for the purpose of describing *the land*, is *material*, as entering into *the description of the cause of action*. And hence a misdescription of the place where the land lies is in nature of a *variance*, in stating the consideration of the promise. If therefore the declaration describes the land, as lying in the parish of *A.*, when it is actually situate in the parish of *B.*, the plaintiff cannot recover: because the proof will not support the declaration.

ALL CRIMINAL PROSECUTIONS remain local under the ancient rule of the common law, that every issue in fact, triable by jury, must be tried in the county in which the fact to be tried occurred. (*z*) For the distinction, since introduced, between local and transitory remedies, was expressly limited to *civil* suits.

Hence no *crime*, committed within the territorial limits of one Sovereign State, can be tried in any other. (*a*) For

(*x*) 6 T. R. 62; 6 East, 348; 2 Chitt. Pl. 9, (n. d.) 174, (n. c.); 3 M. & S. 380.

(*y*) 6 East, 348, 352; 6 T. R. 62; 1 Taunt. 570; 1 Esp. 273; 3 Campb. 235; *Vid* 13 East, 9; 4 B. & A. 619; 3 Stark. Ev. 1571, *et seq.*

(*z*) 7 Co. 2. b; Com. Dig. *Action*, N. 5, 9; 1 Saund. 308 (n. 1.); 2 Black. Rep. 1058.

(*a*) 2 Black. Rep. 1058; Kel. 80; *Shepherd v. Boyce*, 2 Johns. 447, 499.

the *penal* laws of every Sovereign State are, in the strictest sense *local*, and cannot therefore be enforced by the tribunals of any other State (b): it being an elementary principle of *public* and *municipal law*, that all offences considered as *public wrongs*, offend that State only within whose limits they are committed; and no State has a right to punish for any other offences, than those committed against *itself*.

THE LOCAL ACTIONS, THUS FAR ENUMERATED, are all, (except so far as the statute 32 Hen. 8. has prescribed the rule, in certain actions, on *leases*), made local by the principles of the common law.

BUT CERTAIN OTHER ACTIONS, which upon common law principles are transitory, are, by the English statute-law, required to be brought in the county, in which the cause of action in truth arose; and are thus made local by positive enactments.

Thus by the statute 21 Jac. 1, c. 4, § 2, all actions and informations, etc., 'for any offence against any *penal statute*, whether on behalf of the king, or any other person,' are required to be 'laid and alleged to have been committed, in the county where such offence was, in truth, committed, and not elsewhere; or the defendant, upon the general issue, shall be found not guilty.'(c) When, however, *two* material facts are necessary to constitute an offence against a penal statute, if one of those facts occurred in one county, and the other in another; the action may be laid in either of the two counties, according to the analogy of the *common law* rule in similar cases.(d) Thus in an action on the statute of *usury*, if the contract was made in the county of A., and the illegal interest received in the county of B.; the venue may be laid in either of those counties. It

(b) 3 T. R. 733; 1 H. Black. 123.

(c) Com. Dig. *Action*, 10; Bac. Abr. *Action*, q. t. C. 1; Chitt. Pl. 276-7; 1 Salk. 373; 5 Mod. 425; 4 Ib. 158.

(d) 7 Co. 1; 2 T. R. 238; 7 Ib. 583; 2 Bos. & P. 381.

appears to be settled, in the construction of this statute, that it does not extend to any action given, by a penal statute, to the *party aggrieved* by the offence prohibited: so that the action, when brought by such a party, is still *transitory*, as at common law.(e)

By the *common* law then, (as the last observation implies), actions for the recovery of statute penalties, are transitory.(f) For though the *object* of every prosecution for such a penalty, is the punishment of the defendant for an *offence*; yet an action brought for this purpose, is in form a civil suit(g); and as regards *venue*, as well as in most other respects, the nature or character of every suit, or prosecution, is decided by its *form*. Indeed, a pecuniary penalty is in law considered as a *debt*, due from the offender to the prosecutor, or plaintiff in the action(h); and hence the action brought for the recovery of it, and which is usually an action of *debt*, is, by the common law transitory; on the same principles on which other actions of debt are generally so.

From what has been already stated, of the law of venues, it results that no suit can be *abated*, nor in any manner defeated, on the ground that the venue is laid in the wrong county, unless the action is in its nature *local*, or is made so by statute.(i) For in consequence of the distinction between local and transitory actions, it has become an established rule, that in *transitory* actions, the *place* laid in the declaration draws to itself the trial of all *transitory* matters alleged in the subsequent pleadings. And the defendant cannot there-

(e) Bac. Abr. *Action*, q. t. C; 1 Show. 354. The rule is the same in New York.

(f) Id.

(g) Cowp. 382, 391; Willes, 597; 1 Wills. 125; 4 T. R. 753; 7 Ib. 257; 3 Ib. 448; *Board v. Classon*, 17 How. Pr. 193; 18 Ib. 331.

(h) Bac. Abr. *Statute*, K. Poph. 175; Palm. 400; Latch, 19; 3 Black. 160-161.

(i) 3 Black. Com. 294; Bac. Abr. *Actions Local*, etc. B. Com. Dig. *Pleader*, S. 9; Cowp. 177; 1 Saund. 74. (n. 3.); Gilb. H. C. P. 89-90.

fore state, in his plea, any *other* venue for the facts which he pleads, than that laid in the declaration; unless the nature of the defence renders another venue *necessary*(*j*); i. e. unless his defence is founded upon something *local*, arising in a different place from that which is laid in the declaration.(*k*)

If therefore in a *transitory* action, the cause of which is laid in the county of *A.*, (in which county the suit is brought), the defendant pleads any *transitory* matter of defence, as having arisen in the county of *B.*; the plea is ill in form.(*l*) For if the defendant might, *without necessity*, thus deviate from the venue laid in the declaration, he would upon original *common-law* principles, be able to *change* or *oust* the venue in transitory actions; and thus to subvert the rule, which allows the plaintiff, in such actions, to bring his suit in what *county*, and lay his *venue* in what *part* of it, he may choose: since, if issue was taken upon the plea, in the case supposed, the original rule of the common law would require the *trial* to be had in the county of *B.*

If then, in an action of assault and battery, trover, trespass for taking goods, slander, assumpsit, etc., (in all which the place in the declaration is *immaterial* and the action *transitory*), the defendant pleads any matter of defence, which is *not local*—and lays it at a place not mentioned in the declara-

(*j*) Com. Dig. *Pleader*, E. 4; 3 Lev. 113; 1 Saund. 8, a. (n. 2.) 85, (n. 4.) 247, (n. 1.); 2 Ib. 5. d. e. (n. 3.); 2 H. Black. 161; Com. Dig. *Action*, N. 12; *Pleader*, C. 20; 1 Chitt. Pl. 509; Co. Litt. 282. b.

(*k*) The provisions of the New York Code as to the *place of trial* of an action,—(see and compare its sections)—are considered *not to prevent, absolutely*, the trial of even a *local* action, in a county different from that which the Code makes *the right one*; even though it *appear on the face* of the complaint in a local action, that the venue is laid in a wrong county. As the right to have the venue corrected, on motion, belongs to the defendant; his failing to require the change is held to *waive* the right, (and the *error*, if such it be.) *Chubbock v. Morrison*, 6 How. Pr. 368; *Bangs v. Selden*, 13 Ib. 379. [*Phillips v. Tietjen*, 108 App. Div. 9]. Of course, a trial in the wrong county would *not* be a *mistrial*.

(*l*) Id.

tion; the plea is ill, on special demurrer.(m) If, for example, in an action of assault and battery laid in the county of *A.*, the defendant pleads *son assault demesne*, in the county of *B.*; or, if in trespass for taking goods in the county of *A.*, the plea is a license, in the county of *B.*; or if in assumpsit on a promise laid in one county, the defendant pleads fraud, duress, accord and satisfaction, usury, etc., in *another*: the plaintiff may with safety demur specially to the plea.(n) For these several defences, in *whatever place* they may have arisen, are respectively as available, as if they had occurred *elsewhere*; and there can, therefore, be no *necessity* of laying them at any other place than that stated in the declaration.

But although the cause of action be *transitory*—as in the several examples last stated; yet if the *nature of the defence is local*—so that the fact, that it arose in a particular county or place *different* from that stated in the declaration, is *necessary* to be alleged in order to adapt the plea to the matter of the defence; the defendant is at liberty to *deviate*, in his plea, from the county or place alleged in the declaration.(o) For if, in such a case, he was confined to the county or venue laid by the plaintiff, he might, by the *false venue* in the declaration, be utterly deprived of his defence. For when issue is joined upon a *local* fact, the *place* is of the substance of the issue, and must be proved as laid.

Thus, if a sheriff of the county of *A.*, having made an arrest, by authority of law in that county, is sued for it, in an action of assault and battery and false imprisonment, alleged to have been committed in the county of *B.*; he may, in his plea, justify the arrest as having been made in

(m) *Id.*

(n) *Id.*; Co. Litt. 282. b; Cro. Eliz. 667, 842, 860; 1 Ld. Ray. 120; 3 Lev. 113; 2 Mod. 271.

(o) Cro. Eliz. 184; Co. Litt. 282, b; 3 Lev. 113, 227; 1 Ld. Ray. 120; 1 Saund. 85, (n. 4.) 247; 2 Ib. 5. b. (n. 3.); Carth. 326; Hob. 5.

the former county. (*p*) For as his official authority, existing only in the county of *A.* was *local*; his defence, which is founded upon that authority, is necessarily so. If then, he were obliged to justify the arrest, as made in the county of *B.*; he would of course, be reduced to the necessity of proving his authority to arrest in *that* county, (which according to the facts supposed, he could *not* be), or of losing the benefit of a justification, which is in law complete.

Upon the same principle, if a constable of the town of *A.*, makes arrest in that town, in virtue of his office, and is sued for it in an action, in which the trespass is laid in the town of *B.*; in the same or a different county; he is allowed to justify the arrest in the town of *A.* (*q*) For the town, which limits his authority, is material to his justification, as is the *county* to that of the sheriff, in the case last before supposed. The same principle applies to all cases, in which the defence is *local* and in which the place laid in the declaration is not the *true* one; because in every such case, if issue is taken on the plea, the *place* must be proved as laid.

But in all such cases, it is necessary for the defendant to *traverse* the place laid in the declaration: i. e. to deny that he is guilty of the alleged wrong in that place, or in any other than the one stated in his plea. (*r*) For the place of the alleged wrong is, by the defendant's plea, made *material* and *traversable*: and it is a general principle, that a party who does not traverse what is material and *traversable*, in his adversary's pleading, tacitly admits it to be true. (*s*)

(*p*) 1 Saund. 85, (n. 4.) 247; 2 Ib. 5, b. c. (n. 3.); 1 Ld. Ray. 120; Cro. Eliz. 174, 184.

(*q*) Id.

(*r*) 2 Saund. 5, c, d, e, (n. 3.); 1 Ib. 85, (n. 4.); Ib. 8, a. (n. 2.); 1 Sid. 294; Cro. Eliz. 167, 705, 842; Cro. Jac. 45, 372; 3 Lev. 227; Carth. 326.

(*s*) 1 Salk. 91; Wils. 338; Bac. Abr. *Pleas*, etc., *Introd.*; Ib. *Pleas*, etc. H. 4.

By the establishment of the rule, that the *venue* laid in the *declaration* draws to itself the trial of all *transitory* matter, the doctrine of *venues* underwent an essential change. For as, under this rule, no *other venue for transitory* matters can be laid in the subsequent pleadings; there seems now to remain no very substantial reasons for requiring, for the statement of *such* matters in these latter pleadings, any venue at all.

In accordance with the principles, which have now been stated, Lord Chief Justice Eyre, observed that 'the distinction between laying no venue at all, in a *plea*, and being obliged to lay the *same* venue, as is to be found in the *declaration*, will not be a very substantial one'—and that it appears to be 'a *distinction without a difference*.' (t)

It would seem therefore, on principle, that in the pleadings which *follow* the *declaration*, the laying of a venue for *transitory* matters, is not now necessary, even in point of *form*; and therefore, that the omission of it will not injure those pleadings, even on special demurrer.(u) Indeed this precise point was adjudged in the case just referred to.(v)

And since the statutes 16 & 17 *Car.* 2. c. 8., and 4 & 5 *Ann.* c. 16, § 6. (by which the ancient law regarding *locality of trials* was still further altered), the laying of a venue, for even *local* matters, in the pleadings *subsequent* to the *declaration*, appears now to be, in the English law, but mere *form*.(w) For by the former of these statutes, it is enacted that 'after a *verdict*, judgment shall not be stayed or reversed, for that there is no *right* venue; so as the cause were

(t) *Ilderton v. Ilderton*, 2 H. Black. 145, 161–2. And *vide* 7 T. R. 243, 247; 1 Saund. 8 a.; Yelv. 12, a.; *Furnane v. Haskin*, 2 Caines, 372; *Thomas v. Rumsey*, 6 Johns. 33; [*Holder v. Aultman*, 169 U. S. 81, 90].

(u) *Id.*

(v) *Ilderton v. Ilderton*, *supra*; *Neale v. DeGaray*, 7 T. R. 243, 247.

(w) That is, as regards the place of *trial*.

tried by a jury of the proper county or place, where the *action is laid*.'(x) And this enactment not only cures a wrong *venue*, laid in the *true* county; but also aids *after* verdict,(y) a judgment rendered in a *wrong county*; even though it appear *upon the record*, that the issue was tried in a county other than that in which the matter in issue arose;(z) whereas, by the ancient law, if it appeared upon *the record*, that the cause of action arose in a county different from that, in which the action was laid; the mistake was incurable, and the judgment erroneous,(a) unless the error was waived by both parties, in the manner hereafter mentioned.

The latter of the two statutes above mentioned (4 & 5 Ann. c. 16. §6.) enacts, that every *venire facias*, for the trial of any issue, in any action or suit, shall be awarded of *the body* of the proper county, where such issue is *triable* (b): the import of which enactment, expressed in more familiar language, is, that the jury, by whom any issue is to be tried, in any particular county, are to be summoned from the county at large, without reference to the common law rule, requiring them to come from the immediate *vicinage*, in which the matter in issue arose: which rule had, indeed, by various evasions and alterations, been greatly relaxed in practice, before the statute of *Anne* was passed.(c)

(x) Bac. Abr. *Amendment*, etc., B.; 2 Saund. 5. e. (n. 3.)

(y) This provision, which applies only to judgments *after verdict*, was by the statute 4 Ann. c. 16, § 2, extended to judgments by *confession*, *nil dicit*, or *non sum informatus*. Bac. Abr. *Amendment*, etc. B; 2 Saund. 5. e. (n. 3.)

(z) 1 Saund. 247, (n. 3.); Willes, 431; 7 T. R. 583; 2 Saund. 5. g. (*in notis.*); 2 East, 580; 1 Chitt. Pl. 283; 1 Saund. 74. (n. 2.)

(a) Com. Dig. *Action*, N. 4, 6; 1 Saund. 74. (n. 2.); 1 Chitt. Pl. 283.

Later the same rule was applied to actions, transitory at common law, but made local by *statute*. Vide 5 M. & S. 427. 3 Ib. 430; and cases there cited.

(b) Bac. Abr. *Venue*, D; 3 Black. Com. 360.

(c) Co. Litt. 157; 3 Black. Com. 360.

This latter enactment, by removing the necessity of drawing the jury from the immediate *vicinity*, in which the matter in issue arose, or is alleged to have arisen, virtually abrogated the ancient law of *venues properly so called*—inasmuch as it destroyed all distinction between true and false venues, in one and the same *county*; as the statute of *Charles II.* (*extended by the second section of the 16th chapter of the statute of Anne*), rendered all distinction between different *counties*, immaterial after *verdict*, *confession*, *nil dicit*, or *non sum informatus* (*d*)—(provided the trial in the case of a verdict found), was by a jury of the same county, in which the ‘action was *laid*.’ (*e*)

From the combined operation of these statutes, it has resulted as has been already suggested, that the laying of a venue for even *local* matters, in the pleadings *subsequent* to the declaration has become, in effect, matter of form as regards the *place of trial*. For the new venue laid for any local matter, in the *plea*, does not now (as formerly) draw to itself the *trial* of such matter; and the consequence of the distinction between things local and transitory has finally been, that in *transitory* actions, the defendant can by *no plea abate* or *defeat* the suit, on the ground that the venue or

(*d*) A *confession* (or *cognovit actionem*) is an express acknowledgment, by the defendant, upon the record, of the plaintiff's right of action. (3 Black. Com. 397; 3 Chitt. Pl. 520, 671.) By a *nil dicit* or *default*, is meant, that the defendant offers *no plea* whatever to the declaration, and thus tacitly admits it to be true. (3 Black. Com. 397.) A *non sum informatus* is a suggestion or admission, by the defendant's attorney, that he has no instructions to make any answer to the plaintiff, or any defence for his client; and is, therefore, virtually a species of *default*.—(*Id.*)

(*e*) The statute of *Anne* having been construed not to embrace actions on *penal statutes*, was by the subsequent act, 24 Geo. 2. c. 18, extended to this latter class of actions (3 Black. Com. 360), and the jury therefore, was summoned from the body of the county, in all civil actions. (Lawes' Pl. 28, 29.)

county, in the *declaration*, is not the true one. (f) And since the statute 16 and 17 Car. 2. ch. 8, if the defendant pleads even a *local* defence to a *transitory* action; he can have no opportunity to object to the *county*, in which the action is brought, or to the *venue* laid in the declaration, till *after verdict*; and then, by the express provisions of that act, the objection is *too late*: the mistake being cured by the verdict.

And in regard to the *venue* laid in the declaration, as distinguished from the *county* (g), in a transitory action, all exception, in any and every stage of the suit, is precluded by the sixth section of the statute of Anne before recited. There now remains, therefore, *no* way in which the defendant, in a *transitory* action, can oblige the plaintiff to change the *county* laid in the declaration, except by *motion*, addressed to the discretion of the court, and which, under circumstances to be hereafter stated, the court has power to grant. Nor is there any mode whatever, in which the defendant in *such* an action, can take advantage of a false *venue* laid in the true county.

After the enactment of these statutes, therefore, it was the constant practice in England, when issue was taken, even upon a *local* defence laid in a foreign county (a county other than that mentioned in the declaration), to try the issue in the county in which the action was *brought* (h)—which practice is subject only to the power of the court, on *motion*, to remove the cause for trial, into the county in which the cause of action arose. It appears then, that according to the English law, as it now stands, and subject to the single

(f) Black. Com. 294; Bac. Abr. *Actions Local*, etc. B; Com. Dig. *Pleader*, S. 9; Cowp. 177; 1 Saund. 74. (n. 2.); Glhb. H C. P. 89-90.

(g) The word *venue*, in its present acceptation, usually includes as well the county named, as the *place or vicinage* laid within it; though, in strictness, the term signifies the *vicinage* only; in which latter sense, it is, in the present instance, used in the text

(h) 1 Saund. 74, (n. 2.); 2 Ib. 5. d. e. (n. 3.); Ld. Ray. 330, 1212; 3 Black. Com. 294.

qualification just mentioned, the venue, (or rather, the *county*), laid in the declaration, in *transitory* actions, regularly draws to itself the trial, as well of all *local*, as of all *transitory* matters alleged in the *subsequent* pleadings. Hence, if in a transitory action, brought in the county of *A.*, issue is joined on any *local* matter of defence, laid in the county of *B.*, the trial is regularly had in the county of *A.* (i): the defendant having in general, no power to change the place of trial, before verdict; and the trial in the county of *A.* being, *after verdict*, aided by the statute of Charles II., before mentioned.

But before that statute was made a trial in the county of *A.*, in the case last supposed, would have been a *mistrial*, and as such, a sufficient ground for arresting the judgment. (j) So strict, indeed, was the original rule of the common law, in regard to the locality of trials, that, from a transitory action, the defendant pleaded the general issue to a *part* of the alleged cause of action, and a *local* justification to the *residue*; the general issue must have been tried in the county, in which the action was *laid*, and the justification, in the county laid in the *plea*. (k)

(i) 1 Saund. 247, (n. 2.); 1 Vent. 22, 263; T. Ray. 181; 2 Saund. 5. e. (n. 3.); 2 Lev. 164; 3 Ib. 394; 7 T. R. 583; Carth. 448; 12 Mod. 8.

(j) Gouldsb. 38. 88; Cro. Eliz. 261, (468.) 870; Com. Dig. *Action*, N. 6; 1 Saund. 247; Mo. 257; Hob. 5; 2 Saund. 5. d. (n. 3.)

(k) 1 Saund. 247. (n. 1.); Cro. Jac. 87, 127; 3 Lev. 394; Co. Litt. 125. n.

The statutes of Charles II, and Anne, are *modern*, and not here binding, as statutes. The provision of the N. Y. Revised Statutes differs from those of the English statutes. Ours is "if the cause was tried by a jury of the *proper county*;" the English (Chas. II), being, "tried by a jury of the proper county, *where the action is laid*," (1 Saund. 247; 7 Term Rep. 583, 587)—which, by the statute of Anne, is modified by the words "where such issue is *triable*."—But as, *on the pleadings*, 'the proper county' is the county *as laid*, it would seem that our statute, (before the Code,) would cover *any* case, *after verdict*, etc. The words, in the English statutes, succeeding 'proper county,' would seem rather *explanatory*, than *substan-*

It is however still necessary, notwithstanding the foregoing alterations in the law of venues, that in alleging *local matter*, even in the pleadings which *follow* the declaration, the place in which it arose should be truly stated. Thus, (as in a case before supposed), if the sheriff of the county of *A.* makes a lawful arrest, under legal process, or *virtute officii*, in that county, and is sued for it, in trespass for assault, battery, etc., alleged to have been committed in the county of *B.*; it is necessary that he should justify the arrest, as having been made in the county of *A.*(*l*) This is necessary, however, not for the purpose of substituting the true *venue*, for that laid in the declaration, or in other words, not for the purpose of altering the *place of trial*; but for the purpose of rendering the matter of his plea *available*: it being indispensable to the sufficiency of his defence, that the arrest should be shown, in the plea, to have been made within the *local limits of his authority* as sheriff.

The power of the court to *change*, on the defendant's motion, the venue laid in the declaration in transitory actions, has already been incidentally mentioned—a power, supposed to be derived from the statute 6 Rich. 2, c. 2.(*m*) This power, which is discretionary, has been exercised under a rule of practice by the superior courts of Westminster, from the reign of *James the First*; in whose reign its exercise appears to have commenced.(*n*)

tively independent. Especially would this seem, now, to be so, as applied to the New York practice; since our courts hold, under the Code, *any action triable in any county where the venue is laid.* *Chubbock v. Morrison*, 6 How. Pr. 368; *Bangs v. Selden*, 13 Ib. 379. [See § 985 N. Y. C. C. P.]—It seems that our *statutes* now stand in lieu of the *actual consent on the record*, which would have cured the difficulty at common law. Cro. Eliz. 664.

(*l*) Cro. Eliz. 174, 184; 1 Saund. 85. (n. 4.); 2 Ib. 5. c. (n. 3.); 1 Ld. Ray. 120.

(*m*) 1 Saund. 74. (n. 2.) [And see, *Cocheco R. Co. v. Farrington*, 26 N. H. 428; *Hewitt v. State*, Fla. (1901), 30 So. 795].

(*n*) 3 Black. Com. 294; 2 Salk. 670.

[This subject is regulated by statute in probably all of the states.

Under this rule of practice, if the defendant, in a transitory action, will make affidavit that the alleged cause of action arose exclusively in a *foreign* county, the court may, in its discretion, order a change of the venue, and award a trial in the *latter* county—unless the plaintiff will, on his part, undertake to give evidence of some matter, material to the issue, arising in the county in which the action is *brought*.(o) And if the plaintiff, after having entered into such an engagement, fails on the trial to comply with it, by giving evidence of some matter involved in the issue, and arising in the county in which the action is laid; he will be *nonsuited*.(p): his failure, in this particular, being a violation of the *condition*, on which the venue in the declaration was allowed to remain unchanged.

It is still indispensably necessary, even in transitory actions, that some particular *county* be laid in the declaration,

The provisions of the New York statutes are contained in sections 985 *et seq.* of the Code of Civil Procedure. The ground usually assigned in asking for a change of venue is the convenience of the witnesses, or the unlikelihood of securing a fair trial (by reason, for example, of local prejudice, or of interest, bias or prejudice of the judge). It is not necessary to show conclusively that a fair trial cannot be obtained, it being sufficient, (at least under the New York statute and others similarly worded), that there is "reason to believe" so. *Jacob v. Oyster Bay*, 119 App. Div. 503.

A motion on the ground of "convenience of witnesses" is addressed to the discretion of the court. *Pattison v. Hines*, 105 App. Div. 82; *O'Beirne v. Miller*, 35 Misc. 337. And in determining the disposition of such a motion the court will consider the materiality of the witnesses and their number, in connection with other circumstances (*Hurley v. Roberts*, 117 App. Div. 337; *Shaff v. Rosenberg*, 116 App. Div. 336; *Ballston Storage Co. v. Defoe*, 67 App. Div. 341); as, for example, whether a fair trial can be had in the county where the witnesses reside (*Twomey v. Kingsford*, 68 App. Div. 180). But the court cannot make the granting of the motion on this ground conditional on consent to a reference. *L'Amoureux v. Erie R. R. Co.*, 62 App. Div. 505].

(o) 2 Black. Rep. 1032-3; 1 Saund. 74. (n. 2.); Cowp. 410; 2 T. R. 275; 6 East, 433-4; Com. Dig. *Action*, N. 13.

(p) *id.*

for the sake of *trial*.(q) For in every action, in which there is an issue joined, triable by jury, the jury-process must go to *some* particular county. But if *no* county is laid in the declaration, it cannot be known from what county the jury shall be summoned, nor, consequently, in what county or place the trial shall be had.

But as the jury now come from *the body* of the county, in which the action is laid; a *venue*, strictly so called, (i. e. a particular *vicinage*,) though universally inserted in the precedents, would seem, in *transitory* actions, in general, to be not indispensable, on common-law principles, even in the *declaration* (r); and so it has been adjudged.(s)

By the ancient rule of the common law, the omission of a venue or county, when necessary, appears to have been an incurable defect(t), by reason of the strict locality of *trial*, which that rule required. But since the distinction between things local and transitory was fully established, it has long been settled, on *common law* principles, that if the declaration in a *transitory* action, mentions *no* venue or county; it is aided by the defendant's pleading to the action, any plea, that *admits* the fact, for the *trial of which* some particular county ought to have been laid(u): because the fact when *admitted* by such a plea, requires *no trial*. And therefore, if in debt on bond, the declaration omits to state the *county* in which the instrument was made, and the defendant pleads in bar a release, payment, accord and satisfaction, or any other

(q) Com. Dig. *Pleader*, C. 20; Cowp. 176-7; 5 T. R. 620; 2 Lev. 227; Bac. Abr. *Venue*, C.; 3 T. R. 387.

(r) 2 H. Black. 161; 2 East, 501, *arg.*; 1 Chitt. Pl. 280.

(s) 3 M. & S. 148.

Venue, and 'the county where the action is *triable*,'—as laid,—seem now to be synonymous, in New York. *Bangs v. Selden*, 13 How. Pr. 377-8. At least, we have no other venue.

(t) Bac. Abr. *Venue*, C.; 2 Leon. 22; 1 Chitt. Pl. 283.

(u) Bac. Abr. *Venue*, C.; Com. Dig. *Pleader*, C. 20, 85; 6 Mod. 222; 2 Ld. Ray. 1040; Cro. Jac. 125, 683; Hob. 82; Hardr. 187.

defence, which *admits* the execution of the bond; the defect is cured by the *plea*(*v*) on the principles last stated. And the same principles apply to all *transitory* actions, in general, whether sounding in contract or tort.

And the omission of a venue or county, in the declaration, in *transitory* actions, is on *common law* principles aided on a judgment by *default*.(*w*) For all the issuable facts stated in the declaration, being, by the default, *confessed*; no *trial* of them is necessary. And by the express provisions of the statute 16 and 17 *Car.* 2. c. 8, the omission of a venue or *county*, in the declaration, is aided by *verdict*.(*x*) And the same rule was extended, by the *second* section of the statute 4 and 5 *Ann.* c. 16 to judgments by *confession*, or *non sum informatus*.(*y*) It results, therefore, that by these two enactments, the want of a venue or *county*, in the declaration, in *transitory*, as also in personal *local* actions, is aided after *verdict*, or on *judgment by confession*, or on *non sum informatus*; as the *common law* had before cured the same omission, on judgment by *nil dicit*, (or default) or on the defendant's pleading to the action any defence, which *admitted* the truth of the declaration.

But, as it is still necessary, in point of form, even in *transitory* actions, that some *county* be laid in the *declaration*; the omission of it remains fatal, on *demurrer*.(*z*) For as the statutes before mentioned, which cure the defect after *verdict*, *confession*, etc., do not aid it, under a *demurrer*; the omission, when the declaration is *demurred* to, is left to operate as at common law.(*a*)

(*v*) *Id.*

(*w*) *Com. Dig. Pleader*, C. 20; 1 *Lutw.* 239; *Chitt. Pl.* 285.

(*x*) *Bac. Abr. Amendment*, &c., B.; 2 *Saund.* 5 e. (n. 3.); 7 *T. R.* 587.

(*y*) *Bac. Abr. Amendment*, B.

(*z*) *Bac. Abr. Venue*, C.; *T. Ray.* 181; 2 *Wills.* 355; 3 *T. R.* 387; 1 *Chitt. Pl.* 285; 14 *East*, 291; *Vide Briggs v. Nantucket Bank*, 5 *Mass.* 94, 98.

(*a*) In *N. Y.*, the causes of *demurrer*,—(so-called,)—being *specified* by the Code (§ [488];)—and the omission of any county for the

But such an omission in the declaration, in transitory actions, is not a ground of *nonsuit*, nor of any objection on the trial. (b) Since no advantage can be taken of defects *apparent* upon the face of the pleadings, but by an issue *in law*. It results then from the preceding rules, that in a transitory action, a demurrer is the *only* mode, in which advantage can now be taken of the omission of a *county*, in the declaration: all exceptions, in any other form, for such a defect, being, as we have seen excluded by gradual relaxations of the strictness of the ancient rule, and by legislative enactments.

According to the principles of the common law, as already stated, a *transitory* action, the cause of which has arisen in any one county or sovereign state, may in general be brought in any other, in which the defendant may be found (c); for duties and liabilities, of a transitory nature, attend the *person* of the party chargeable, wherever he may be. Hence, if a personal contract is made, or a personal tort committed, in the kingdom of *France*; an action will lie against the debtor, or wrongdoer, (if found in *England*), in an *English* court of general jurisdiction, and may, in general be laid in *any* English county, without making mention of the place where the cause of action actually arose. (d) In such a case, it is necessary that *some* English county be laid in the declaration, for a reason heretofore explained; viz.

place of trial not being one of those causes;—advantage of such an omission must be taken by special motion to dismiss the complaint. See *Merrill v. Grinnell*, 10 How. Pr. 31; *Davison v. Powell*, 13 Ib. 287. The practice, however, is to allow the complaint to be *amended*, in this respect, on payment of costs.—Where the motion to dismiss should be made is not entirely certain. See *Davison v. Powell*, *supra*.

(b) 2 Wils. 354; 1 Chitt. Pl. 285; 2 East, 499; 3 T. R. 387; 1 Saund. 74. (n. 2.)

(c) Com. Dig. *Action*, N. 7; Cowp. 161, 177–8, 181, 344; 2 H. Black, 145–161; Co. Litt. 125, a. (n. 1.); 5 T. R. 616; 7 Ib. 243; 1 Saund. 74. (n. 2.)

(d) *Id.*

that every action must be laid in *some* particular county in the kingdom for the sake of *trial*. And this legal fiction, like all others devised for the furtherance of justice, cannot be traversed.(e) Thus, if A. becomes indebted to B., or commits a tort upon his person, or personal *chattels*, in the city of *Paris*, or of *Canton*; an action, in either case may regularly be maintained against A. in *England*, (if he is there found,) upon a declaration, alleging the cause of action to have arisen in that *English* county, in which the action is laid, without taking notice of the foreign place.

But to this rule there is one exception, in respect to the *mode* of laying the county. If an action is brought, in an *English* court, on a specialty, dated at a place in a foreign country—as at *Amsterdam*; the declaration must describe the bond, as made at *Amsterdam*, for the purpose of avoiding a variance. For if the instrument were described, as having been made in any *English* county; it would not, when produced, correspond to the *description* given of it in the declaration. In this case, however, the name of the foreign place, at which the bond is dated, must be followed, (under a *videlicet*,) by that of the county in which the action is laid—as in the manner following:—‘At the city of *Amsterdam*, to wit, at *Islington*, in the county of *Middlesex*’(f): the foreign place being named, for the purpose of correctly *describing* the instrument; and the *English* county, for the sake not only of *trial* but of *jurisdiction*. For by the *theory* of the common law, an *English* court has jurisdiction of such matters only as arise *within the realm*, or in the body of an *English* county—to conform to which *theory*, the fiction, just mentioned, was invented. And as has been stated already, the fiction employed for this purpose cannot be traversed.

(e) Cowp. 177-8, 179; 3 Black. Com. 43, 107.

(f) 2 Salk. 660; Cowp. 161, 177, 178; 2 Ld. Ray. 1043; Bac. Abr. *Actions Local*, &c., A.; 2 H. Black. 161-2; Com. Dig. *Action*, N. 7, 12; 1 Stra. 612.

For if it were traversable, the jurisdiction might be ousted, at the pleasure of the defendant, and the administration of justice obstructed.

But the necessity of laying the true place of the execution of written instruments is now, in general superseded in England, by the practice of dating them, *at large*; i. e. without naming the *place* of execution. *(g)*—Actions, the causes of which arise upon the *high seas*, and which are cognizable by the common law courts, may be laid in any county. *(h)* In most cases, local actions in courts of general jurisdiction, might be tried (even by the common law, and without reference to the statute of 16 and 17 Car. ii. c. 8) in any county, by *consent* of both parties entered upon the record—though the county should appear, from the record itself, to be a wrong one. *(i)* For the consent, thus entered, was a waiver on the record, of the error which would otherwise have been fatal to the trial. But unless such consent appear *upon the record*, it would not, (where the county appeared, from the body of the record, to be a wrong one), prevent error. *(j)* Because an error, apparent in the body of the record, cannot be waived, except by what appears on the record itself.—But by the statute above mentioned, (according to the construction given to it by the courts), as has been before shown, such consent on the record is no longer necessary to prevent error.

But in actions, brought for the recovery of *lands* or *tenements*—as in *ejectment*—no consent of parties, it seems, can render a trial, in a wrong county, *effectual* on the principles of the *English* law; though such consent, (while it was necessary,) would have prevented error. *(k)* For the sheriff of the

(g) Com. Dig. *Actions*, N. 7, i2; 1 Saund. 74. (n. 2.)

(h) Cowp. 179.

(i) Com. Dig. *Action*, N. 11; 1 Chitt. Pl. 271; Cro. Eliz. 664.

(j) Id.; Hob. 5, c. n. 2 (*Williams'* ed.); Bac. Abr. *Error*, K. 6.

(k) Palm. 100; 2 Roll. Rep. 166; T. Jon. 199; T. Ray. 372.

county, in which the action is tried, to whom only, as it seems, the execution can, in such case, be directed, cannot deliver possession of land lying in another county. (l) So that there would be eventually, no means of enforcing the judgment. This difficulty does not exist in the United States. (m)

The general rule, that a venue must be laid for all *traversable* facts, is not universal. *Negative* allegations regularly require no venue. (n) For place can, with no propriety, be predicted of that which has no existence. So also, matters which concern the *person* of a party, or of any individual—as his *name*, *title*, etc.—need not be laid at any particular place (o): these also being facts of which locality is not predicable.

In alleging wrongs affecting a *local* subject—as the breaking and entering the plaintiff's close, in an action of trespass, or the *ouster* in ejectment—a formal *venue* need not be laid for the wrongful *act* complained of; although it constitutes the *gist* of the action. (p) For as the description, which is required to be given of the *land*, must state as well the parish, etc., as the county, in which it lies; the place where the act was done will necessarily appear, from that description—which thus, in effect, supplies the venue, without formally laying one. And as upon original principles of the common law, already stated, those facts only, which may be *traversed*, require a venue; it follows that matters of mere *inducement*

(l) 1 Chitt. Pl. 284; Cowp. 176; 7 T. R. 588.

(m) By the New York Code, [§ 1365] execution may issue to any county where the judgment has been *docketed*; and it may be docketed, (at the plaintiff's pleasure, and of course,) in *any*, and *every*, county of the State. And executions, upon the same judgment, may be issued at the same time, to two or more different counties.

(n) Plowd. 24, a.; 2 East, 503; Lawes' Pl. 58.

(o) 1 Salk. 6; Lawes' Pl. 58.

(p) Com. Dig. *Pleader*, C. 20; 2 Black. 706; Cro. Jac. 555, 557; 2 Mod. 304; Lawes' Pl. 58.

or *aggravation*, require none(*q*): because such matter is not traversable.—The mode of laying the venue in the *English* precedents, is by placing the name of the county in the *margin*, at the commencement of the declaration, in the following manner:—‘Middlesex, to wit’(*r*) and, in the body of the declaration; the county aforesaid; is a sufficient description.

(*q*) 1 Saund. 74. (n. 1.); Com. Dig. *Pleader*, C. 20; Co. Litt. 303, a.; Salk. 404.

(*r*) Lill. Ent. *passim*; 2 Chitt. Pl. 1, 2, 3, 4, 141.

CHAPTER II.

MISCELLANEOUS RULES.

FACTS, NOT EVIDENCE MUST BE STATED.—It has already appeared that all facts, *essential* to the right of action or the defence, must, in general, be expressly and substantively alleged. Hence, stating the mere *evidence* of a material fact is not sufficient. (a) The *fact itself* must be stated; otherwise

(a) 9 Co. 9, b; Willes, 131; Cro. Eliz. 913; 2 Root, 74; 2 Stra. 793; Cro. Jac. 383; Chitt on Bills, 186-7.

[It is a fundamental rule under the codes that the facts which constitute the cause of action—resultant or ultimate facts—conclusions of fact—must be set out and not evidentiary facts, or the facts by which the ultimate facts must be established. *Miles v. McDermott*, 31 Cal. 271; *Usher v. Waddingham*, 62 Conn. 412, 428; *New York & New England R. R. Co.'s Appeal*, 62 Conn. 527, 541; *Brainard v. Simmons*, 58 Ia. 464, 468; *Kain v. Larkin*, 141 N. Y. 144; *Brown v. Champlin*, 66 N. Y. 214; *Williamson v. Wager*, 90 App. Div. 186; *Gleitsmann v. Gleitsmann*, 60 App. Div. 371; *People v. Woodbeck*, 55 App. Div. 277; *Spies v. Munroe*, 35 App. Div. 527 (pointing out that a pleading differs from an affidavit in that the latter must set out the evidence establishing a fact); *Doherty v. Shields*, 86 Hun 303; *Badeau v. Miles*, 9 Abb. N. C. 48 (granting a motion to strike out); *City of Guthrie v. Finch*, 13 Okla. 496; *Tabor v. Indianapolis Journal Newspaper Co.*, 66 Fed. 423; *Muser v. Robertson*, 17 Fed. 500.

"If the facts stated are such that if they were proved as stated, the plaintiff must recover by operation of law; then the plaintiff has set forth a sufficient cause of action. * * * A statement of certain evidence from which the law draws a conclusion of fact, is in effect a statement of that fact; but a statement of evidence from which the law would not draw a conclusion of fact, but which would be left to a jury to find one way or the other, although it be so clear that a jury ought to find only one way, may not be sufficient in pleading." *Tolman v. Rochester City Bank*, 18 Barb. 123, 138. An allegation of one suing a carrier for loss of baggage that he holds

the allegation will present no subject to which the law can be applied. Besides, such a mode of pleading would, if admissible, refer the matter of *fact* in question to the court, instead of the jury. Thus, if in trover, the plaintiff alleges a property in the goods—the loss—the finding—and a *demand and refusal*—but omits to aver a *conversion*; the declaration

the carrier's check is not equivalent to an allegation of delivery of the baggage to the carrier. *Park v. So. Ry. Co.*, (S. C.) 58 S. E. 931. It would be pleading evidentiary facts to set out the steps taken in the consolidation of corporations under a foreign statute when it is already alleged that the consolidation was effected under such statute, which is set out, and that the statute was complied with. *Rothschild v. Rio Grande West. R. Co.*, 18 N. Y. Suppl. 548.

In *Phila., B. & W. R. Co. v. Allen*, 102 Md. 110, the complaint alleged that the company so negligently and unskillfully conducted itself in carrying the plaintiff and "in managing the said railroad and the car and train in which the plaintiff was a passenger * * * that the plaintiff * * * was thrown down and wounded and injured," &c. The court said by the Chief Justice: "It is the breach of the duty that is owed that constitutes the cause of action. The particular circumstances which evidence that breach, are not the breach itself, but are merely the facts which prove that a breach of the duty that was owed had occurred. * * * An averment that the cause of the injury was the negligence of the company * * * is a definite statement of the fact upon which the plaintiff relied to sustain a recovery, and did not need to be amplified by a recital of other facts which, if established, merely proved that there had been negligence in the management of the railroad and train and car in which the plaintiff was a passenger." But see, *Lewis v. San Francisco*, (Cal.) 82 Pac. 1106, holding that an allegation of involuntary payment of fees to the city was an ultimate fact which, as in a case depending on fraud or negligence, was insufficient against a demurrer because unsupported by the averment of probative facts.

But unnecessary particularity does not vitiate a pleading otherwise good (*Denithorne v. Denithorne*, 15 How. Pr. 232), and the remedy is a motion to strike out the additional statement of matters of evidence, and not a demurrer (*Bolt v. Gray*, 54 S. C. 95; *Western Travelers' Accident Asso. v. Munson*, Neb., 103 N. W. 638). If, however, a complaint is filled with statements of evidentiary facts and does not allege sufficient ultimate facts to show a right of action a demurrer should be sustained. *Ensign v. Dickinson*, 46 State Rep. 845, 19 N. Y. Suppl. 438].

is ill: the demand and refusal being only *evidence* of a conversion, which is the *gist* of the action. (b)

ALLEGATIONS NOT TRAVERSED ARE ADMITTED.—Each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse. (c) For as each party is *allowed* to deny in some form—(either by a general, or precise traverse)—all material facts alleged against him; the omission, by either party, to traverse any such fact, alleged by his adversary, is justly considered as an *admission* of it. (d)

(b) 1 Roll. Ab. 131; Hob. 187; 2 Show. 179; 10 Co. 56, b, 57, a.; 3 Burr. 1243; 2 H. Black. 135-6; Cowp. 529, *Contra*; 6 Mod. 212. [See *Thayer v. Gile*, 42 Hun 268].

(c) Bac. Abr. *Pleas*, &c., H. 4; *Ib.*, *Introd.*, 2; 1 Salk. 91; 1 Wills. 338.

(d) [This refers to material facts. *Watson v. Lemon*, 9 Col. 200; *Hight v. Barrett*, 94 Ga. 792; *McNeal v. Calkins*, 50 Ill. App. 17; *Hartley v. Hartley*, 3 Metc. (Ky.) 56; *Sullivan v. Traders' Ins. Co.*, 169 N. Y. 213; *Corn v. Levy*, 97 App. Div. 48; *Snell v. Crowe*, 3 Utah 26.

An admission in pleading is equivalent to proof and dispenses with proof. But this rule extends no farther than the action in which the pleadings are filed. *Boatman's Sav. Inst. v. Holland*, 38 Mo. 49.

An admission in one count of a declaration is not evidence against the plaintiff under another count. *Starkweather v. Kittle*, 17 Wend. 20.

An admission in an answer of what is properly pleaded for one purpose is not admissible for another purpose for which it is not properly pleaded. *Conn. Hospital v. Brookfield*, 69 Conn. 1].

In New York this can be said of only the statement in the *complaint*; except where the answer sets up a *counter claim*; (Code, §§ [500, 501, 507] which calls for *affirmative relief*. Code, § [522], confines such admission to *material facts*.

Since the rule operates only with respect to *material* allegations, a demurrer admits no more than is well pleaded; and, if a plea denies a particular fact alleged in the declaration, it does not thereby admit all the immaterial averments, which the pleader has chosen to introduce as part of the plaintiff's case. *Bennion v. Davison*, 3 M. & W. 179; *Dunford v. Trattles*, 12 Id. 534; Parke, B., *King v. Norman*, 4 C. B. 884; 1 Taylor Ev., 3d ed., § 148.

Thus, where a declaration in *assumpsit*,—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused

for the sake of *trial*.(q) For in every action, in which there is an issue joined, triable by jury, the jury-process must go to *some* particular county. But if *no* county is laid in the declaration, it cannot be known from what county the jury shall be summoned, nor, consequently, in what county or place the trial shall be had.

But as the jury now come from *the body* of the county, in which the action is laid; a *venue*, strictly so called, (i. e. a particular *vicinage*,) though universally inserted in the precedents, would seem, in *transitory* actions, in general, to be not indispensable, on common-law principles, even in the *declaration* (r); and so it has been adjudged.(s)

By the ancient rule of the common law, the omission of a venue or county, when necessary, appears to have been an incurable defect(t), by reason of the strict locality of *trial*, which that rule required. But since the distinction between things local and transitory was fully established, it has long been settled, on *common law* principles, that if the declaration in a *transitory* action, mentions *no* venue or county; it is aided by the defendant's pleading to the action, any plea, that *admits* the fact, for the *trial of which* some particular county ought to have been laid(u): because the fact when *admitted* by such a plea, requires *no trial*. And therefore, if in debt on bond, the declaration omits to state the *county* in which the instrument was made, and the defendant pleads in bar a release, payment, accord and satisfaction, or any other

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(r) 2 H. Black. 161; 2 East, 501, *arg.*; 1 Chitt. Pl. 280.

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Venue, and 'the county where the action is *triable*,'—as laid,—seem now to be synonymous, in New York. *Bangs v. Selden*, 13 How. Pr. 377-8. At least, we have no other venue.

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defence, which *admits* the execution of the bond; the defect is cured by the *plea*(*v*) on the principles last stated. And the same principles apply to all *transitory* actions, in general, whether sounding in contract or tort.

And the omission of a venue or county, in the declaration, in *transitory* actions, is on *common law* principles aided on a judgment by *default*.(*w*) For all the issuable facts stated in the declaration, being, by the default, *confessed*; no *trial* of them is necessary. And by the express provisions of the statute 16 and 17 *Car.* 2. c. 8, the omission of a venue or *county*, in the declaration, is aided by *verdict*.(*x*) And the same rule was extended, by the *second* section of the statute 4 and 5 *Ann.* c. 16 to judgments by *confession*, or *non sum informatus*.(*y*) It results, therefore, that by these two enactments, the want of a venue or *county*, in the declaration, in *transitory*, as also in personal *local* actions, is aided after *verdict*, or on *judgment by confession*, or on *non sum informatus*; as the *common law* had before cured the same omission, on judgment by *nil dicit*, (or default) or on the defendant's pleading to the action any defence, which *admitted* the truth of the declaration.

But, as it is still necessary, in point of form, even in *transitory* actions, that some *county* be laid in the *declaration*; the omission of it remains fatal, on *demurrer*.(*z*) For as the statutes before mentioned, which cure the defect after *verdict*, *confession*, etc., do not aid it, under a *demurrer*; the omission, when the declaration is *demurred* to, is left to operate as at common law.(*a*)

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will be *rejected* by the court, and the pleadings will stand as if it were *struck* out, or had never been inserted.

as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." Mr. Justice Lawrence added, "I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." 2 East, 451, 452. See, also, *Salem India Rubber Co. v. Adams*, 23 Pick. 265; *Earle v. Kingsbury*, 3 Cush. 210; *Dutton v. Gerrish*, 9 Id. 92; *Schuchardt v. Allens*, 1 Wall. 368, 369; *Jackson v. Allaway*, 6 M. & Gr. 942; 7 Scott N. R. 875, S. C.; *Attorney-General v. Clerc*, 12 M. & W. 640; *Tempest v. Kilner*, 2 C. B. 300; *Anderson v. Thornton*, 8 Exch. 425; *Thorn v. Bigland*, Id. 725; *Southall v. Rigg. and Forman v. Wright*, 11 C. B. 481; *Hampshire Manufacturers' Bank v. Billings*, 17 Pick. 87; *Commonwealth v. Wellington*, 7 Allen, 299, 302.

In an action on a promissory note brought by the indorsee against the maker, the defendant pleaded that he delivered the note to the indorser to enable him to take up a former accommodation note, and that after the note declared on became due, he paid the amount to the plaintiff. On a replication *de injuriâ* to this plea, the court held that the averment introductory to the payment of the last-mentioned note might be rejected as surplusage, and need not be proved. It amounted, in fact, to a mere unnecessary statement of the motive which induced the defendant to give the note. Mr. Justice Coleridge observed: "The distinction is between an averment, the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defense, which are stated with needless particularity. In the latter case the whole averment must be proved as pleaded. In the former case, in civil or criminal proceedings, the whole may be considered as struck out, and, therefore, need not be proved." *Shearm v. Burnard*, 10 A. & E. 593, 596; 2 P. & D. 565. See, also, *Noden v. Johnson*, 16 Q. B. 218, 226, 227, Patte-son, J.

A writ described the defendant as administrator of an estate, and the declaration alleged that the defendant as administrator was indebted to the plaintiff. The words in the writ and in the declaration, designating the defendant as administrator, cannot be rejected as

But where a party pleads *unnecessary* matter which shows that he has no cause of action or no legal defence, the matter thus pleaded will be fatal to that which would, otherwise, have been good. (j) For in this case, the superfluous matter cannot be *rejected as immaterial*; since it shows that the pleader has, according to his own statement, no cause of action, or no defence. Thus if in declaring upon a public statute, the plaintiff *so* counts upon it, as to confine himself to its terms as recited, (as by the words, "*contra formam statuti predicti*,") but *misrecites* it, in a material part; the declaration is ill in substance. (k) For although the recital of a public statute is *unnecessary*: yet, it being thus recited, and counted upon, the plaintiff must recover upon it, if at all,

surplusage, because they characterize the action as an action against the estate, and not against the defendant personally. The personal liability of the defendant on a contract with the plaintiff cannot be tried under this form of declaration. *Yarrington v. Robinson*, 141 Mass. 450.

(j) *Id.*

[Mere matters of evidence in pleadings are to be treated as surplusage. *Attorney-General v. May*, 97 Mich. 568, 573.

A demurrer will lie to a pleading so entirely composed of irrelevant and redundant matter that it states no cause of action or no defense. *Bradley v. Reynolds*, 61 Conn. 271; *Com. v. Washburn*, 128 Mass. 421. But generally the remedy for surplusage is a motion to strike out. See *Troy v. Bennett*, 5 Sandf. 54; *Polly v. Saratoga & W. R. Co.*, 9 Barb. 449; *Watson v. Husson*, 1 Duer, 242; *Montgomery v. N. P. R. Co.*, 67 Fed. 445; *Plymouth Gold Min. Co. v. U. S. Fidelity & Guar. Co.*, 35 Mont. 23; *Blaut v. Blaut*, 41 Misc. 572.

Sections 537, N. Y. C. C. P., (providing for application for judgment upon a frivolous demurrer, answer or reply), 538 (providing for motion to strike out sham answer or defense), 545 (providing for motion to strike out irrelevant, redundant or scandalous matter), were designed to simplify pleadings and clarify the issue and facilitate trial. *Dole v. Smith*, 43 Misc. 417.

On demurrer the court will disregard as surplusage everything beyond the statement of facts necessary to set out some cause of action. *Villias v. Stern*, 24 Misc. 380].

(k) *Com. Dig. Pleader*, C. 29; *Ib. Action upon stat. I.*; 1 Ld. Ray. 382; *Plowd.* 84, b.; *Cro. Eliz.* 245; *Yelv.* 127, a. note. (1.)

as recited. But, as it must, of necessity, appear judicially to the court, that no such statute as that recited, exists; it must consequently appear, in the same manner, that the declaration discloses no right of action.

REPUGNANCY ALWAYS A FAULT.—So also, superfluous matter, when it *contradicts* or is *inconsistent with facts* before alleged on the same side vitiates the pleadings.(l) This fault falls properly under the denomination of *repugnancy*; which as the term imports, is some *contrariety* or *inconsistency* between different allegations of the same party.(m)

Repugnancy is a fault in all pleading (n); and this, upon the obvious principle, that *inconsistent* allegations, in the

(l) Co. Litt. 303, b.; Com. Dig. *Pleader*, E. 12; Lawes' Pl. 63-4, 170; Gilb. H. C. P. 132.

(m) Such superfluous matter cannot be considered as mere *surplusage*; for by *surplusage*, properly so called, is generally meant such superfluous matter, as may be *rejected*, or entirely *disregarded*.

[By the codes generally (New York C. C. P., sec. 507) the defendant may set out in his answer as many defenses or counter-claims, or both, as he has. And they may be inconsistent. *Societa Italiana v. Sultzer*, 138 N. Y. 468; *So. Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592. The rule was otherwise in New York from 1876, when the Code provision was changed, till 1879, when the old rule was again adopted. As an illustration, in an action for slander the defendant may deny that he spoke the words and, as an additional defense, may allege that the words, if spoken, were true. *Buhler v. Wentworth*, 17 Barb. 649.

If, however, from the nature of the case, it is not possible for the defendant to avail himself of both inconsistent defenses, he may be required to elect. *Wendling v. Pierce*, 27 App. Div. 517. In *Western Travelers' Accident Ass'n v. Tomson*, 72 Neb. 661, 669, it was said, quoting from *Home Fire Ins. Co. v. Decker*, 55 Neb. 346, that a defendant may allege as many grounds of defense as he may have, "subject only to the condition, implied from the requirement in regard to verification, that such defenses shall not be so repugnant that if one be true the other must be false."].

(n) 1 Saund. 169; 2 Ib. 291; 1 Stra. 232; 1 T. R. 70, 71, 657; [*Gulliver v. Fowler*, 64 Conn. 556, where the complaint alleged that a guaranty was signed for value received, and the answer after admitting the truth of the matters contained in the complaint went on to allege that the guaranty was without consideration].

pleading of either party, destroy or neutralize each other. The rule, however, is to be understood with third difference: if the pleading is repugnant, in a *material* point; it is ill in *substance* or on *general* demurrer; but repugnancy in an immaterial point is a fault in *form* only (*o*), and therefore no advantage can be taken of it, except by *special* demurrer. Thus if in trover, the declaration by mistake alleges the conversion to have taken place on a day *prior* to that, on which the loss of the goods is laid; or if in ejectment the ouster is laid on a day *prior* to the alleged date of the lease; the repugnancy, in either case; would at *common* law, (before the statute of *jeofails*), have been fatal, on general demurrer: but the day being now considered but matter of *form*, the repugnancy is in both cases aided, except on *special* demurrer. (*p*)

PLEADING ACCORDING TO LEGAL EFFECT.—It is laid down as an established rule, that all things must be pleaded according to their *legal effect* (*q*); i. e. must be stated or described, as they operate or take effect, *in law*; although such statement or description should *vary literally* or in *form*, from the matter of fact to be shown in evidence. This rule relates chiefly to cases in which a written instrument, drawn in a *form* in which it cannot by the rules of law, take effect, may nevertheless operate as an instrument of a *different kind*: in which case *ut res magis valeat quam pereat*, the law will so construe it, if possible, as to give it effect, as an instrument of a *differ-*

(*o*) *Id.*

(*p*) *Com. Dig. Pleader*, C. 19; 3 *M.* 5; *Yelv.* 94; 3 *Black. Com.* 394; *Carth.* 389; *Com. R.* 12; 1 *Saund.* 116; 1 *Lev.* 194; *Andr.* 250; *Stra.* 232, 1095.

(*q*) *Bac. Abr. Pleas*, &c., I. 7; *Co. Litt.* 193, b.; *Com. Dig. Pleader*, C. 37; 2 *Saund.* 96-7; *Cowp.* 600; *Cro. Eliz.* 352; *Doug.* 667; 2 *Salk.* 574; 1 *Ld. Ray.* 400; *Lawes' Pl.* 62; 1 *T. R.* 446; 109 *U. S.* 555.

[Not changed by the Code. *Rochester R. R. Co. v. Robinson*, 133 *N. Y.* 242; *Thayer v. Gile*, 42 *Hun* 268; *Boyce v. Brown*, 7 *Barb.* 80. But "the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove." *Plumb v. Curtis*, 66 *Conn.* 154].

ent kind from that, which in its language it purports to be. (r) For it is an established rule, that a deed shall never fail of effect, if by construction it can be made effectual. (s)

If then a deed, in the form of a contract or conveyance, of one particular species, cannot from the nature of the thing, operate except as a contract, or conveyance, a *different* kind; it must according to the above rule, be pleaded, as a deed of the *latter* kind. Thus if a deed purporting to *give, grant, bargain, sell and release*, cannot in the nature of the case, take effect in law, except as a release; it must according to the above rule be *pleaded* as a *release*: or if it cannot operate, except as a deed or *bargain and sale*; it must be *pleaded as such*. (t)

And in all such cases, a mistake in stating the legal effect, if it appears upon the face of the pleadings, is fatal on demurrer (u); and if it does not thus appear, it is fatal in evidence. (v) For the court cannot, in either case, give judgment for the pleader, in opposition to his own *averments*. If, therefore, a deed of feoffment, with livery of seisin, is made by a *joint-tenant* to his co-tenant; it must, according to this rule, be pleaded not as a *feoffment* but as a *release*. (w) For a feoffment cannot take effect, as between joint-tenants; since each of them is already seised as well *per tout*, as *per mie*—as well of the *whole*, as of the *half*. So also, if a tenant for life makes a conveyance, in form of a *grant*, to the reversioner; it is, by the same rule to be pleaded as a surrender (x): the latter

(r) Shep. Touch. 82-3; Cro. Eliz. 352; 2 Salk. 574; 2 Saund. 96; T. Ray. 187; 1 T. R. 446; 4 Mod. 150.

(s) Shep. Touch. 82-3; Hob. 277; 2 Saund. 96, n. 1.

(t) Cro. Eliz. 166; 7 Vent. 109; 2 Saund. 97, b. (n. 2.); Co. Litt. 301, b.; Carth. 308.

(u) 2 Vent. 151; 3 Lev. 291; 2 Saund. 97, c. (n. 2.); 4 Mod. 149; Carth. 253.

(v) 1 H. Black. 313, 569; 3 T. R. 182, 481; 2 Stra. 934-5.

(w) Com. Dig. *Pleader*, C. 37; 4 Mod. 150; Bac. Abr. *Pleas*, &c., I, 7; Co. Litt. 193, b. 200, b.; 2 Saund. 96.

(x) Bac. Abr. *Pleas*, &c., I, 7; 4 Mod. 151; Comb. 190.

being the only form of conveyance, by which the interest of the particular tenant can, by the common law, pass to the reversioner.

Under the same rule, if one *covenants to stand seised* to the use of his child, or near relative, for a *pecuniary* or *valuable* consideration; the conveyance must be pleaded, as a deed of *bargain and sale*.(y) For a covenant to stand seised is not supported by a valuable consideration, but by that only of *natural affection between kindred*, or that of *marriage*: whereas a conveyance by *bargain and sale* can be supported, by no other than a *valuable* consideration.(z) Hence, on the other hand, a deed in the form of a *grant*, or of a *bargain and sale*, made to a near relative, and expressed to be in consideration of *natural affection*, must, on the same principle, be pleaded as a covenant to stand seized (a): because such a consideration will support *no other* conveyance, than a covenant to stand seised.

And a single deed, made by two persons, having distinct interests in the subject of it, may enure to *two different intents or effects*. Thus if a tenant for life or years, and the reversioner, join in a deed of conveyance, in the form of a deed of *bargain and sale*; it will, as against the reversioner, take effect as a *bargain and sale*, and *quoad* the tenant, as a *surrender*. In such a case therefore, the conveyance should, by the above rule, be *pleaded* according to its twofold legal effect—viz. as a *bargain and sale*, on the part of the reversioner; and as a *surrender*, on that of the tenant.(b)

Within the same general rule, a *covenant* by a creditor, with his debtor, never to sue for the debt, should be pleaded,

(y) Carth. 308; 3 Lev. 291; 4 Mod. 149; 2 Vent. 149.

(z) 2 Black. Com. 342.

(a) 2 Wils. 22, 75; Willes, 673, 682; 4 Mass. 135; 2 Saund. 97, a. (n. 1.); Bac. Abr. *Pleas*, &c., I, 7; 2 Vent. 149, 260, 267.

(b) 1 Ld. Ray. 400; Lutw. 569.

not *as* a covenant, but as an *acquittance*.(c) For, *as a covenant*, it cannot *bar* an action for the recovery of the debt; although it would entitle the debtor to *damages*, in a cross action of covenant broken: since a covenant is no bar to an action brought upon a different contract, unless the former contains words of *defeasance*.(d)

So also, when a bill of exchange is payable in its terms, to the *order of a fictitious* payee, the holder, in declaring upon it, must, by the same rule, describe it as a bill payable to bearer (e): this being the only form in which it can take effect.

But the rule itself, of which the preceding examples are given, as illustrations—though generally laid down as being *imperative*—ought rather to be expressed, as *permissive*. And the more proper form of stating the rule, would be, that where the form and legal effect of an instrument differ, it *may* be pleaded, according to its legal effect. For, though this latter is confessedly the more scientific and approved mode of pleading, in all such cases; yet the pleader *may*, at his option—instead of stating the legal effect—*recite* the instrument, *in hæc verba* and refer its legal operation to the court.(f) For

(c) Cro. Eliz. 352; 1 Show. 46; 1 Roll. Ab. 939; 1 T. R. 446; 8 Ib. 170-1; Willes, 109, *note*; *Tuckerman v. Newhall*, 17 Mass. 581.

(d) 1 Lev. 152; 6 T. R. 737; 8 Ib. 483; Esp. Dig. 306.

(e) 1 H. Black. 313, 569; 2 Ib. 194, 288; 3 T. R. 178, 282, 335, 481.

(f) 1 Ld. Ray. 400, 403, 404; Lutw. 569; 2 H. Black. 11; 8 Lev. 292; *Herrick v. Bennett*, 8 Johns. 374.

[It is sufficient to charge the legal effect of a transaction, contract, or instrument in writing. *Brown v. Champlain*, 66 N. Y. 214. For example, the orders and regulations of a railroad company need not be set out in full; it is sufficient if they are alleged according to their legal effect. *So. R. Co. v. Simmons*, 105 Va. 651.

Neither by the practice of the Federal courts nor, generally, under the codes is it required that a written instrument sued upon should be set out *in hæc verba*. *Bank of Timmonsville v. Fidelity & Casualty Co.*, 120 Fed. 315; *Anderson v. Gaines*, 156 Mo. 664. Such instrument may be pleaded according to its legal effect, or it may be incorporated in the pleading, or a copy thereof may be attached to the

if when the form of the deed differs from its legal effect, and it is *pleaded* according to that effect, the court can perceive from the instrument, that it supports the statement, *in evidence*; there appears to be no sufficient reason, why—when the deed is recited, *in hæc verba*—its legal effect may not be recognized by the court, upon the face of the *pleadings*.

If however the pleader undertakes to state the legal effect, and *misstates* it; the mistake will be fatal (*g*): as if a deed, which can operate in law only as a *release*, or *surrender*, is pleaded as a *grant*, or *bargain and sale*, or *vice versa*. For in such a case, the allegation, professing to state the legal effect, is essentially *untrue*.

IMMATERIAL AND IMPERTINENT ALLEGATIONS.—There is an important distinction to be observed, between *immaterial* and *impertinent* averments: viz., that the former must, in many cases, be precisely proved; whereas the latter require no proof in any case. (*h*)

For the purpose of explaining this distinction, it must be premised, that an *impertinent* averment is a statement of matter altogether *foreign* to the merits of the cause, and

pleading. *Santa Rosa Bank v. Paxton*, (Cal.) 86 Pac. 193; *Seal v. Cameron*, Wash., 63 Pac. 1103; *Page v. Freeman*, 19 Mo. 421.

In one or two States, however, a written instrument sued on must be set out. *Blackwell v. Pendergast*, 132 Ind. 550; *Ellwood Natural Gas & Oil Co. v. Glaspy*, 77 N. E. 956. And if it is copied in the complaint it is not necessary to allege its substance separately. *Miller v. Wayne International Bldg. & L. Asso.*, 32 Ind. App. 480].

(*g*) 3 Lev. 291; 2 Saund. 97, c. (n. 2.); 4 Mod. 149; Carth. 253; 1 H. Black. 313, 516; 3 T. R. 182, 474, 481; 2 Stra. 934-5; 3 B. & A. 66. [If an instrument is set out *in hæc verba* and is not ambiguous it is for the court to determine its legal effect uninfluenced by the conclusions of the pleader. The inference of the pleader in such a case is surplusage. *Ill. Glass Co. v. Three States Lumber Co.*, 90 Ill. App. 599. And see, *Miller v. Wayne International Bldg. & Loan Asso.*, *supra*.]

(*h*) Doug. 667; 2 Black. Rep. 1104; 3 T. R. 643; 5 Ib. 496; 2 East, 446, 451, 497; 3 Bos. & P. 456, 461; 2 McNall. Ev. 501, 513. [See *Harrison v. Perea*, 168 U. S. 311, 318-319].

which might, therefore, be *entirely struck out*, without injury to the pleading. Of such matter no proof can ever be required.⁽ⁱ⁾

An immaterial averment is one alleging with needless particularity or unnecessary circumstances what is material and necessary, and which might probably have been stated more generally, and without such circumstances or particulars. In

(i) Doug. 667; 2 Black. Rep. 1104; 3 T. R. 644-5. [See, *Bowman v. Sheldon*, 5 Sandf. 657; *Lee Bank v. Kitching*, 11 Abb. Pr. 435; *Jeffries v. McKillop*, 2 Hun 351; *Noval v. Haug*, 48 Misc. 198; *Carpenter v. Reynolds*, 58 Wis. 666.

Section 545 of the New York Code of Civil Procedure provides irrelevant, redundant or scandalous matter contained in a pleading may be struck out on motion of the person aggrieved thereby. Such motions are not regarded favorably (*Dalziel v. Press Pub. Co.*, 52 Misc. 207), are largely within the discretion of the court (*Kavanaugh v. Com. Trust Co.*, 181 N. Y. 121), and usually will not be sustained unless the matter complained of will prejudice the moving party (*Dinkelspiel v. Evening Journal*, 91 App. Div. 96; *Stokes v. Starr Co.*, 69 App. Div. 21; *Palmer v. Day*, 44 Misc. 579). Admissions and denials are irrelevant in a defense. *Sanford v. Rhoads*, 39 Misc. 548.

Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything that is unbecoming to the dignity of the court to hear. *McNulty v. Wissen*, 130 Fed. 1012; *Kelly v. Boetcher*, 85 Fed. 55. The New York Code provision regarding this fault is merely declaratory of the common law. And the court of its own motion may suppress papers or strike out statements therein which contain scandalous matters. *People, ex rel. Allen v. Murray*, 22 N. Y. Suppl. 1051.

Irrelevant matter which is injurious to the character or reputation of a party is scandalous, and will always be struck out on motion of the party aggrieved (*Hilton v. Carr*, 40 App. Div. 490), who need not be a party to the cause (*Wehle v. Loewy*, 2 Misc. 345).

Scandalous matter is always impertinent (*McIntyre v. Union College*, 6 Paige 239), but allegations are not scandalous, however injurious they may be, if they are material to the case (*Wilmington & W. R. Co. v. Board of Railroad Com'r's*, 90 Fed. 33).

"Inconsistent" and "redundant" are often used as synonymous terms. *Swan v. U. S.*, 3 Wyo. 151.

other words, it is a statement of unnecessary particulars, in connexion with, and as descriptive of, what is material. (j)

(j) An *immaterial* averment, (as contradistinguished from an *impertinent* one), has been variously described; but not always with sufficient precision. In the case of *Bristow v. Wright*, Doug. 665, Lord Mansfield, in commenting upon the distinction between these two species of averments, observes, 'The distinction is between that, which may be rejected as *surplusage*, and which might have been *struck out* on motion, and what cannot. Where the declaration contains *impertinent matter*, *foreign* to the cause, and which the master, on a reference to him, would strike out, that will be rejected by the court, and need not be proved. But if the *very ground* of the action is misstated; as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited; that will be fatal.'

This language, though sufficiently descriptive of an *impertinent* averment, affords rather a particular *example*, than a general definition or description of an *immaterial* one.

Immaterial averments, and the necessity of strictly proving them, may be illustrated by the case before mentioned, of *Bristow v. Wright*. This was an action, brought on the statute 8 Ann. c. 14. § 1. by a landlord against a sheriff, for taking an execution, and removing from the demised premises, the goods of the tenant, without leaving effects sufficient to satisfy a year's rent. The declaration stated the demise, which it described as reserving a certain annual rent, payable '*by four even and equal quarterly payments*,' &c. On the trial, a parol demise was proved; but it appeared that there was no stipulation with regard to the *time or times* of paying the rent; and for this cause, it was resolved by the court of King's Bench, that the plaintiff could not recover. For though it was confessedly unnecessary to state the time or times of payment, in the declaration—in other words, though this part of the statement was *immaterial*; yet, as it was indispensably necessary to allege reservation of rent: (so that the *entire* statement of the reservation could not be struck out, without destroying the declaration); and as the appointment of certain particular times of payment was stated as a *constituent part* of the contract, which was in its nature entire; a failure to prove such an appointment, was a failure to prove the contract as stated, and consequently a *variance*. The contract proved was not the contract alleged in the declaration.

The same rule, in regard to immaterial averments, was recognized in the case of *Savage, q. t., v. Smith* (2 Black. Rep. 1101, 1104). That was an action of debt against a bailiff, for extorting illegal fees, on a writ of *ſeri facias*. The declaration described the *ſ. fa.*,

The rule, that immaterial averments must be strictly proved, is however by no means universal, though it appears to have been formerly so understood: the *principle* of the rule manifestly embraces, (it is conceived), no other averments of that class, than those, of which a *variance* may be predicated. And the rule itself, it seems is now to be understood as limited by that principle.

The rule, then, as limited by the more modern authorities, appears to be, that no *immaterial* averment requires precise proof, unless the failure of such proof would occasion a *variance* between the pleading and the proof: Or (in different language), strict proof of such an averment is not, at this day, necessary, unless the subject of the averment is a *record*—a *written instrument*—or (as I conceive) an *express contract* (*k*): inasmuch as these are in strictness the only subjects of variance, (properly so called,) when the mistake in the pleading is in a point *not in itself material*. (*l*) It is here

as having been issued, on a judgment recovered in B. R. at a specified term, for £51, 12, 0, debt, and £6, 10, 0, costs. But the plaintiff having failed on the trial to prove such a *judgment*, the court held, that admitting it to have been *unnecessary* for the plaintiff to state any judgment, (*Ib.* 1104, and *vide* 5 T. R. 498), that is to say, admitting the statement, in that particular, to have been *immaterial*; yet being made, as *descriptive of the foundation of the ft. fa.* ; it was necessary to be proved as made. *Acc.* 12 Mod. 127; 3 T. R. 646; 5 *Ib.* 497; 3 Bos. & P. 456, 461; 5 Price, 540; 2 B. & A. 767; 1 M. & S. 204.

(*k*) 3 T. R. 645; 5 *Ib.* 496; 2 East, 452, 502; 4 *Ib.* 400; 5 Esp. 8.

(*l*) The editor of the second English edition of Douglas's Reports observes, in a note annexed to the case of *Bristow v. Wright*, that the rule requiring *immaterial* averments to be strictly proved, is now confined to the cases of 'records and *written contracts*.' This assertion appears to have been founded upon a casual remark of Mr. *J. Buller*, (3 T. R. 646,) that 'perhaps the rule will be found to extend to all cases of *records and written contracts*.' (*Vide* also 3 Cranch, 209.) But that learned judge did not profess, in this occasional remark, formally to define the precise extent of the rule. Indeed, he had before, and in immediate connection with the observation just cited, extended it to '*contracts*,' generally; as Lord

observable, that the decisions in the two cases before stated, of *Bristow v. Wright*, and *Savage v. Smith*, both come within the range of the rule, as thus restricted. For the immaterial averment in question, in the former case, was descriptive of an *express contract*, as that in the latter was of a *record*.

But where, in an action on a policy of insurance on a ship, the declaration contained an averment, that she sailed upon her voyage, *after* the making of the policy; whereas she actually sailed *before* it was made—it was held by the court of B. R. unnecessary for the plaintiff to prove the averment, as made(*m*): because it was not a statement of any part of the *contract*, but of a *collateral* fact, which (as there was no warranty, or representation, in regard to the time of sailing,) could not affect the right of action.

Thus also, where, in an action of debt brought, on the statute 11 Geo. 2, c. 19 § 3, to recover double the value of goods, which were removed by the defendants, to prevent a distress for rent, the declaration averred that *such a certain sum* (£57), was due as rent in arrear—the court of B. R. resolved, that the plaintiff was not bound to prove that particular sum as the amount due.(*n*) For the averment of a *particular sum*, as the amount in arrear, being immaterial, and not descriptive of the terms of the *contract*, (as a statement of the rent *reserved* would have been), was not within the rule requiring precise proof of immaterial averments.(*o*)

Kenyon had done, in the same case. Nor on principle, does there appear any reason for confining the rule to the limit expressed in the note to *Bristow v. Wright*: since a *variance* may occur, as well in the statement of *parol* contracts, as in that of a *written instrument on record*. But what appears decisive against such a restriction of the rule is, that the averment, which was held fatal to the action, in *Bristow v. Wright*, (the leading authority in support of the editor's rule), was an averment, made in stating a *parol* lease. *Vide* *Yelv.* 195, b. n. 1.

(*m*) 5 T. R. 496.

(*n*) 3 T. R. 643.

(*o*) *Vide* 3 Cranch, 193, 208-9.

Immaterial averments *never* require proof in New York. *Only*

If one of the parties expressly *avers*, or *confesses*, a material fact, before omitted on the other side; the omission is cured. For the defect, in the pleading of the one party, is thus supplied by the other; and it may thus be made to appear, from the pleadings on *both* sides, taken together, that he on whose part the omission occurs, is entitled to judgment; although his own pleading, taken *by itself*, be insufficient. (p) Thus where in trespass, the plaintiff complained of the defendant for taking a certain iron hook, without alleging *possession* in himself (which in that action is material), the defendant's plea, in which he confessed and justified the taking of the hook from the *plaintiff's hand*, was held to aid the declaration; inasmuch as it expressly *acknowledged* the plaintiff's possession. (q)

ANTICIPATING DEFENCES.—In general, it is not necessary for either party to allege more than will constitute, *prima facie*, a sufficient cause of action or defence. (r) It is there-

material ones need be denied, or replied to, in *any* pleading; (Code [§ 522]. [This is a mere affirmance of the ancient rule. *Corn v. Levy*, 97 App. Div. 48. The mere allegation of inconsistent facts is not a sufficient denial. *Soper v. St. Regis Paper Co.*, 76 App. Div. 409. No *others* are admitted by *not* being denied. *Nellis v. De Forest*, 16 Barb. 61. Where a reply is not necessary under § 522 to new matter in the answer, such new matter is regarded as controverted by the plaintiff. *Sullivan v. Traders' Ins. Co.*, 169 N. Y. 213; *McRoy Clay Works v. Naughton*, 84 App. Div. 477. So the plaintiff may controvert such new matter by evidence. *Fox v. Powers*, 65 App. 112]. And the *variance* (between the proof and the complaint,) is provided for by section [539] of the Code.

(p) Esp. Dig. 588; Com. Dig. *Pleader*, C. 85; 1 Sid. 184; Cro. Car. 288; Aley, 7; 6 Binn. 24; 9 Pick. 62. *Cont. Gouldsb.* 187; 3 Caines' 73.

(q) 1 Sid. 184, cited, 9 Pick. 64, 65.

(r) 2 Wils. 100; 1 Saund. 299; 1 Ld. Ray. 400; Doug. 159; 1 Vent. 217. See *infra*, DECLARATION.

An exception to this rule has been already mentioned, as obtaining in two particular instances: viz., in pleading *estoppels* and generally, in *dilatory* pleas, (*vide Dilatory Pleas*.) Co. Litt. 352 b. 303, a.; 2 H. Black. 530.

fore in general unnecessary for a party to deny or avoid, by anticipation, all or any of the possible facts, which might furnish sufficient answers in law to his own allegations. For this would not only lead to extravagant prolixity, but would be found *impracticable*.

Thus also, in declaring on a contract, it is unnecessary to aver that the defendant, at the time of making it was of *full age*—or was not a *feme covert*—or, that the contract was not obtained by *fraud*, or *duress*—or, that it was not founded upon an *usurious* or other *illegal* consideration—or to anticipate any other *special* matter of defence.(s) For if any such matter of defence exists, it is for the *defendant* to show it.

Yet in declaring on a contract, the plaintiff must aver that it has not been *performed*; though performance is special matter of *defence*, on the defendant's part. But this allegation, in the declaration, is necessary, not for the purpose of *excluding*, by *anticipation*, the defence of performance; but for that of showing a *prima facie* right of action. For without an allegation of non-performance, no complete right of action can in such a case, appear upon the face of the declaration.

NEW MATTER.—All facts alleged in pleading, which go in *avoidance* of what is before pleaded, on the opposite side, are called *new matter*. In other words, every allegation made in the pleadings subsequent to the declaration, and which does not go in *denial* of what is before alleged on the other side, is an allegation of *new matter*.(t)

VERIFICATION.—And it is a general rule of the common

(s) Plowd. 376, 564; 1 Vent. 217; 1 Saund. 298-9.

(t) [A defense, in the sense in which the word is used in the codes, can consist only of new matter. *George v. City of New York*, 42 Misc. 270. The theory of an affirmative defense is that, without denial of the allegations of the complaint, the defendant can defeat the plaintiff by new matter pleaded. Such a defense admits the allegations of the complaint and seeks to avoid the same. *Schultz v. Greenwood Cemetery*, 42 Misc. 270; *Blaut v. Blaut*, 41 Misc. 572].

law, that all new matter must be followed by a *verification*, or as it is frequently termed, an averment (*u*): a verification being an *averment*, or affirmation, that the pleader is prepared to *verify*, or *prove*, the matter alleged by him; and is expressed in the following form: 'And this he is ready to verify.'^(v)

The necessity of concluding new matter with a verification, arises from the right, which each party has, (until a proper issue, closing the pleadings, is tendered,) to *answer* the allegations on the other side, by new matter of his own, or otherwise, as the exigency of his case may require. And to secure this right to each party, the pleadings, on both sides, must be *kept open* to such answer, until they are closed by an issue, in the manner above-mentioned. And a *verification*, is in general, the conventional and only mode known to the law, of keeping them thus open.

EXCEPTION.—There is one instance, however, in which new matter need not conclude with a verification, and in which

(*u*) 3 Black. Com. 309; Lawes' Pl. 114, 145, 223; Cowp. 575; 1 Saund. 102, 103; Doug. 58.

(*v*) 3 Black. Com. 309.

[Generally, in the Code States, the purpose of verifying the complaint is to compel the verification of the answer. If the answer is verified, the reply must be verified. If the complaint is not verified, but an amended complaint is verified so must be the subsequent pleadings. But if the complaint is verified, and not the amended complaint, the answer need not be. *Brooks Bros. v. Tiffany*, 117 App. Div. 470.

The form generally adopted is that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be on information and belief, and that, as to those matters, he believes it to be true. N. Y. C. C. P. § 526. The exact wording of the statute need not be followed; but a substantial compliance is essential. *Morris v. Fowler*, 99 App. 245.

The verification may be made by an attorney or agent who must state the grounds of his belief; for example, conversations with the defendant, correspondence, &c. *Duparquet v. Fairchild*, 49 Hun 471; *Moran v. Helf*, 52 App. Div. 481. But this does not apply to an officer of a domestic corporation who is to be considered a party. *Henry v. Brklyn Heights R. R. Co.*, 43 Misc. 589.

the pleader may pray judgment, without it: viz., Where the matter pleaded is merely *negative*.(w) For a negative in general requires no *proof*; and it would therefore be impertinent or nugatory for him, who pleads negative matter to declare his readiness to prove it. To an action on a *negative* covenant, therefore the defendant may plead merely that he has not done what he covenanted against, and pray judgment without a verification.

(w) Willes, 5; Lawes' Pl. 145.

CHAPTER III.

DUPLICITY.

PLEADINGS MUST NOT BE DOUBLE.—*Duplicity*, or *double pleading*, consists in alleging, *for one single purpose or object, two or more distinct grounds* of complaint, or defence, when one of them would be as effectual in law, as both or all. This, by the principles of the common law, is a fault in all pleading; because it produces useless *prolixity*, and always tends to confusion, and to the *multiplication of issues*.(a)

The rule forbidding double pleading ‘extends,’ says Lord Coke, ‘to pleas *perpetual, or peremptory*, and not to pleas *dilatory*; for in their time and place, a man may use divers of them.’(b) But by this, is not meant that any dilatory plea

(a) Co. Litt. 304, a.; Finch’s Law, 393; 3 Black. Com. 311; Bac. Abr. *Pleas*, &c., K. 1; Lord v. Tyler, 14 Pick. 156, 164; Hooper v. Jellison, 22 Id. 250; [Hunt v. Haven, 52 N. H. 162, 168.

The only safe test of duplicity is to examine whether a single issue can be made to controvert the pleading, by denying any one material fact. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 397.

Relaxation.—Duplicity being out a defect in form, there was, long before the codes, a marked relaxation in the application of the rules regarding it. *New London City Bank v. Ware River R. Co.*, 41 Conn. 542.]

(b) Co. Litt. 304, a. [Duplicity in the declaration will be considered hereafter. It may be said here simply that “the union of several facts constituting together but one cause of action, is not duplicity.” *Mullin v. Blumenthal & Co.*, 1 Penn. (Del.) 476, (citing *State v. Warren*, 77 Md. 121); *Devine v. Central Vermont R. R. Co.*, 63 Vt. 98; *Gray v. Grand Trunk West. Ry. Co.*, 156 Fed. 736].

may be *double*, or in other words, that it may consist of *distinct* matter, or answers 'to one and the same thing;' but merely, that as there are *several kinds*, or *classes*, of dilatory pleas, having *distinct* offices and effects; a defendant may use 'divers of them' *successively*, (each being in itself *single*), in their proper order. And Lord Coke thus distinguishes dilatory pleas, from pleas *perpetual*, or *to the action*; because the latter are pleas, all having *one and the same* effect—that of *perpetually barring* the action. And as any *one* of these latter pleas, if good, is as effectual, for this purpose, as any number of them; the common law allows but *one* of them 'to one and same thing'—i. e. to the *whole*, or to one and the same *part*, of the declaration, or demand.

As to duplicity in the pleadings which follow the declaration, the rule of the common law is, that every plea must be *simple, entire, connected*, and confined to a *SINGLE POINT*, i. e. a single ground of complaint, or defence.(c) And this rule extends as well to *traverses*, or matter of *denial*, as to the allegation of new matter(d); and as well to the *replication*, and all the later stages of the pleadings, as to the defendant's *plea*.(e)

According to the general description already given of duplicity, a double plea is one, which consists of several *distinct and independent* matters, alleged to the same point, (i. e. to the *whole*, or to one and the same part, of the demand, or defence), and *requiring different answers*.(f) Thus, if the defendant pleads to the same trespass, a *justification* and a *release*—or to the same debt, *duress* and *payment*—or pleads, in one and the same suit, *two* causes of disability in the plain-

(c) 3 Black. Com. 311.

(d) Bac. Abr. *Pleas*, &c., H. 1, 5; Co. Litt. 126, a.; 1 Stra. 317; Bull. N. P. 93; 1 Burr. 316, 321.

(e) Cas. Temp. Hardw. 290; Com. Dig. *Pleader*, F. 16; Fort. 335; 1 Stra. 317; *Cambridge v. Lexington*, 17 Pick. 222; 13 C. B. 162.

(f) Co. Litt. 303, b., 304, a.; Bac. Abr. *Pleas*, &c., K. 1; [*Kellogg v. Miller*, 6 Ark. 468; *Tucker v. Ladd*, 7 Cow. 450].

tiff—as two different *outlawries*, or *outlawry* and *alienage*; the plea is ill for duplicity. (*g*)

But the giving of different answers, (each being in itself single), to *different parts* of the declaration, or writ, does not constitute duplicity: since the different matters, so pleaded, are not alleged to *one and the same* point or thing. (*h*) For example, the defendant may, at the same time, as to part of the declaration, plead the *general issue*, and matter of *avoidance* to the residue—or one matter of *abatement* to one part of the writ, and another, to another part (*i*). Or he may, in the same manner, plead in *abatement*, as to *one* part of the demand, and in *bar* as to another (*j*); for example, in debt on two bonds, he may plead a *nonjoinder*, or other matter of abatement, as to one of them, and *non est factum*, or a special plea in bar, as to the other.

And where there are *several* defendants in the same suit, *each* of them may, regularly, plead for himself a single matter of defence to the *whole*, or different matters to *different parts*.

(*g*) Com. Dig. *Abatement*, C. & I. 3, 4; Tidd, 589; Lawes' Pl. 108.

Under the Code, there is no *demurrer* for duplicity, *eo nomine*, as that is not one of the grounds for demurrer specified. And by § [507] of the Code, a party is authorized to set up *any number* of defenses to the same count, or gravamen. It has, however, been held that such several defenses must not be *so inconsistent*, that proving one *necessarily disproves* the other:—As, that *tender* could not be joined, in an answer, with a *denial*. *Livingston v. Harrison*, 2 E. D. Smith, 197. See *Roe v. Rogers*, 8 How. Pr. 356; *Gooding v. M'Allister*, 9 Ib. 123; *Welles v. Webster*, Ib. 251; *Hollenbeck v. Cloe*, Ib. 289, 290; *Robinson v. Judd*, Ib. 378; *Sweet v. Tuttle*, 10 Ib. 40. The decisions, however, are in conflict. And, (see post, this chapter,) they seem to be *against* the prior statutes here, and elsewhere; and utterly at war with the *liberal* construction of those statutes;—which was, that *each one*, of several pleas, is treated and operates, *as if pleaded alone*; and *each* must stand, or fall, by *itself*.

(*h*) Co. Litt. 304, a.; Bac. Abr. *Pleas*, &c., K. 1, N. I.; Lawes' Pl. 107.

(*i*) Com. Dig. *Abatement*, I, 5; Lawes' Pl. 107–8.

(*j*) 2 Bos. & P. 420; Lawes' Pl. 108; *Vide* 10 Mod. 285–6.

of the writ or declaration. *(k)* In other words, each of the defendants may plead for himself, as if he were a *sole* defendant. For otherwise, any one of them might, through obstinacy or ignorance, or even by collusion with the plaintiff, reduce the others to the alternative of joining in a false or frivolous plea, or of foregoing all defence whatever.

But this rule does not hold, where in an action on *contract*, against several co-defendants, who are charged as joint contractors, they all plead *the same* defence to the action—as where, for example, they all plead the general issue, or *the same* matter of avoidance. In this case, they cannot *sever* in pleading; but must plead jointly. *(l)* Thus, in *assumpsit* against two or more, if they all plead *non assumpsit*, or any other *common* defence; they must do it in one and the same plea, and cannot plead it, *each for himself*, or severally. *(m)* For in an action *on contract*, against several, where they all rely on the same matter of defence, there can be no necessity for their severing in pleading: any matter of defence, which is good for any *one* of them, being necessarily good for *all*; because, a *joint* contract being alleged—a *joint liability* must be established, or there will be a *variance* between the evidence and the declaration, and consequently there can be *no* recovery. And therefore, if they all agree as to the kind of answer to be given to the action; they are respectively as safe in pleading it *jointly*, as they could be in alleging the same matter of defence *severally*: whereas in an action *ex delicto*, against several, the same matter of defence, which may be good for one of them, may be ill for the others; and therefore they are allowed to plead the *same thing*, (the general issue, for example) *severally*; and if they

(k) Hob. 70, 250; Stra. 509, 610, 1140; 2 Ld. Ray. 1372; Co. Litt. 303, a.; Lawes' Pl. 132; 2 M. & S. 26.

(l) *Meagher v. Batchelder*, 6 Mass. 444.

(m) *Ib.*

plead thus, one may be convicted and another acquitted: torts, though charged as joint, being *several* as well as joint. (n)

And even in an action *on contract*, against several, if they choose *different* defences, they may plead severally, i. e. each a *separate* plea, for himself. (o) For such a case is not within the reason of the above exception. Thus, in *assumpsit* against two, one may plead *non assumpsit*, and the other matter of *avoidance*—as *infancy*. For each defendant must be at liberty to choose the ground of his own defence: otherwise, several defendants charged as joint contractors, might all be unjustly subjected, by the refusal of any one of them to unite with the others in a proper plea.

The 'single point,' to which each plea, replication, &c. is required to be confined, need not, as of course, consist of a *single fact*. For several connected facts may be, and frequently are necessary, to constitute a single complete ground of demand or defence. (p) Thus, in pleading an *award* of arbitrators, the defendant may, and must, allege the *submission*, with a statement of the substance of it, and the *making* of the award by the arbitrators, together with a statement of the terms, or substance of it: all these facts being necessary to the establishment of the *single* defence of a decision of the controversy, by an award of arbitrators. (q) And a single traverse either of the submission, or of the award, will be a sufficient answer to the whole plea.

Thus also, in an action for *malicious prosecution*—or in

(n) 1 Saund. 207, a. b. (n. 2.)

If, however, several defendants, charged jointly in tort, *join* in a plea, which is ill for *either* of them, it is so for *all* of them. For an entire plea cannot be *severed*, in its effect; and the defendants might have pleaded the same matter, *severally*.

(o) 3 Esp. 76; 5 Ib. 47; 2 M. & S. 444.

(p) Bac. Abr. *Pleas*, &c., K. 2; 2 Black. 1028; 1 Burr. 320-1; 3 Salk. 142; 3 M. & S. 180; *Currie v. Henry*, 2 Johns. 433; *Patcher v. Sprague*, Ib. 462.

(q) 2 Chitt. Pl. 437-8.

false imprisonment against a sheriff for an arrest made on suspicion of felony—the defendant may plead in bar all such circumstantial facts (however numerous), as conduce to show *reasonable grounds* of suspicion, as the cause of the prosecution, or arrest. For all such facts go to constitute the single defence of *probable cause* (*r*); and the replication, *de injuriâ, etc., absque tali causâ*, answers the whole plea—so that the different facts pleaded do not require *different* answers, and consequently do not conduce to *multiply issues*. The general replication *de injuriâ, etc., absque tali causâ*, is a sufficient traverse, of all the facts pleaded. (*s*)

But if the defendant, in the case last supposed, relies for his justification, upon any criminal *act* of the plaintiff—as, when he justifies the arrest, on the ground of a felony *actually committed* by the plaintiff; he can allege in his plea only *one* such act, without making his defence *double*: because one actual felony is as complete a justification as several would be.

When, however, the fact, relied on as the *gist* of the defence, is but the *consequence* of another fact—or when one of them is a necessary or proper *inducement* to the other, *both* may be pleaded, without making the plea double. (*t*) And therefore an executor, when sued for a debt due from his testator, may plead that he has ‘fully administered, and so has nothing in his hands.’ For the allegation of ‘fully administered,’ serves merely to show *how and why* the defendant has nothing in his hands. So also, to an action by a woman, the defendant may plead that after the cause of action ac-

(*r*) Cro. Eliz. 134, 871, 900; Brigg. 61; 2 Hawk. P. C. ch. 12, §§ 8–16. [*Clopton v. Spratt*, 52 Miss. 251, 262; *Hunt v. Haven*, 52 N. H. 162; *Grayson v. Buchanan*, 88 Va. 251, 257].

(*s*) The rule is the same, as to answers, in New York. *Otis v. Ross*, 8 How. Pr. 193.

(*t*) Plowd. 140, a.; Poph. 186; Mo. 25; Com. Dig. *Pleader*, E. 2; March, 74; Latch, 149; 1 Burr. 320; [*Henry v. Heldmaier*, 226 Ill. 152, 80 N. E. 705; *Robinson v. St. Johnsbury & L. C. R. Co.*, 80 Vt. 129, 66 Atl. 814].

crued, she *took husband*, and that the husband afterwards *released* the action. For it would be of no avail to plead *the release*, without showing the marriage. Neither of these pleas, it may be observed, requires more than a *single* answer.

In debt on bond, the assignment of more than *one* breach of the condition, in the replication, is by the common law, *duplicity* (*u*): because, at common law, *one* breach incurs the forfeiture of the whole penalty; and nothing more could ensue in the plaintiff's favor, from any *number* of breaches. Besides, they would all go to *one and the same point*, viz. the forfeiture of the entire penalty.

But in *covenant broken*, the plaintiff may, by the common law, assign as many breaches as he may think proper. (*v*) For in this action, the plaintiff can recover only the damages *actually incurred* from a breach or breaches of the covenant; and can legally prove no other breaches than those alleged.

And since the statute 8 & 9 W. 3, c. 11, § 8, by which courts of law were enabled to relieve against penalties, in bonds for the performance of covenants, or agreements in indentures, deeds, &c., the plaintiff, in all actions on *penal bonds*, falling within that statute, might, by express provision in the act, assign *as many breaches* as he pleases; and ought for his own sake, to assign as many as there are (*w*): because in all cases within the statute, the plaintiff can recover for such breaches only as are *assigned*; and thus the same rule of damages, and of pleading, was established in these cases, as by the common law prevails in actions of *covenant broken*. (*x*)

(*u*) Com. Dig. *Pleader*, C. 33; Comb. 297; 3 Salk. 108; 2 Wils. 267; Lawes' Pl. 25-7.

(*v*) Com. Dig. *Pleader*, C. 33; Cro. Car. 176; Bac. Abr. *Covenant*, I.

(*w*) Bac. Abr. *Covenant*, I.; 2 Black. Rep. 1016, 1111; 2 Burr. 820; 2 Wils. 377; Cowp. 357; 2 Chitt. Pl. 153; 8 T. R. 126; 6 East, 550, 613; 1 Saund. 58 (n. 1.); *Sevey v. Blacklin*, 2 Mass. 542.

(*x*) As, under the Code, we have *no form of action*; and as courts always avoid inflicting, or enforcing, *penalties*, when they can do

Mere *surplusage*, pleaded in connexion with what is material, never renders a plea double,(y) not only because *utile per inutile non vitiatur*; but more particularly, because matter of surplusage requires no *answer*, and consequently does not tend to *multiply issues*. If therefore the defendant pleads *payment*, and also a previous *readiness* to pay; the plea

so;—a suit here, on a bond conditioned for aught but the payment of money, would come under the latter sections; and only the damages *actually incurred* would be recovered. Therefore, our rule must be, on all such bonds, to allege *all* the breaches relied on. *A fortiori*, such must be our rule, where the suit is for breaches of a *covenant*, which *fixes no amount* as damages for a breach. See *Lampman v. Cochran*, 16 N. Y. 275; *Poler v. N. Y. C. R. Co.*, *Ib.* 479.

Indeed, in the case of *penal bonds*, this is expressly provided for—that is, so far that the *specific breaches* must be alleged in the declaration, (now complaint;) though the *nominal recovery* be for the *penalty* of the bond. As to this *nominal recovery*, it may be observed, that it was based on the ground that *one* breach forfeited the *whole penalty*; and, further, there was originally, at common law, a *legal necessity* for it, arising from the *form* of the action,—*debt*; in which the *exact debt* claimed must be recovered, or there could be *no recovery*. 3 Bla. Com. 154–5. Now, however, that we have *not the form* of action; and are obliged to allege *specific breaches*; there would seem to be *no reason* why the judgment should be for any sum different from the damages actually assessed for those breaches. *Syracuse City Bank v. Coville*, 19 How. Pr. Rep. 385. The *summons*, required in such a suit, would be one *asking relief*.

(y) *Blake v. Grove*, 1 Keb. 661, Sid. 175; Doct. Pl. 138; Bac. Abr. *Pleas*, &c., K. 2.

[*State v. Webb*, 110 Ala. 214; *Raymond v. Sturges*, 23 Conn. 134; *Gilpin v. Ansonia*, 68 Conn. 72; *Dalton v. Drake*, 75 Ga. 115; *Booker v. Goldsborough*, 44 Ind. 490, 499; *Hooper v. Jellison*, 22 Pick. 250.

Matters of inducement may be rejected as surplusage. *Lord v. Tyler*, 14 Pick. 156; *Willey v. Carpenter*, 64 Vt. 212, where the court said: "The facts set forth in the plea as occurring prior to the service of the writ in the action brought by the defendant's wife against plaintiff for slander are stated simply as matters of inducement. All the plaintiff's alleged actions, speeches and conduct subsequent to that time, taken as a whole, and not singly, constitute the ground on which the defendant puts his defense. Hence it was good pleading to specially state them however multifarious they might be."].

is not double: for the alleged readiness to pay is not issuable.

But any thing in itself material, though *ill pleaded*, will, if pleaded in connection with other usable matter, render the pleading double.^(z) And therefore, where in trespass for assault and battery, the defendant *justified*, by alleging a *molliter manus imposuit* for the due correction of the plaintiff as his servant, and also averred that the plaintiff had *released* the cause of complaint, but without averring that the release was *by deed*; it was resolved, that the latter averment made the plea double (a) *because* the alleged release, though *ill pleaded*, in not being alleged to be *by deed*, was nevertheless *issuable*. And it was held, in the same case, that any matter which, if *well* pleaded, would make a pleading double, would have the same effect, though *ill* pleaded: Since such matter cannot be regarded as *surplusage*, nor the plea, which alleges it, as *void*.^(b)

As instances frequently occur, however, in which there exist *two* or more distinct grounds of defence, to one and the same demand; it is obvious, that the common-law rule, confining the defendant to a *single* plea consisting of a *single* matter of defence, must sometimes have operated unjustly against him: inasmuch as any misapprehension on his part, or on that of his counsel, in regard to the law, or the facts of the case, or as to the eventual state of the proof, might sometimes induce him to choose an unavailing defence, in preference to another, which would have been successful. And thus he may have been subjected to a recovery, when

(z) Bac. Abr. *Pleas*, &c., K. 2; [*Conover v. Tindall*, 20 N. J. L. 517.

Each defense need not be complete in itself to render a pleading double. *Vaughan v. Everts*, 40 Vt. 526].

(a) *Ib.*; 1 Keb. 661; 1 Sid. 175.

(b) By a *void* plea, is to be understood one, of which the adverse party is not bound to take notice in any way, and which he may therefore entirely pass over, by signing judgment as *for want* of a plea.

the right of the controversy, both in law and in fact, was on his side. These considerations occasioned the enactment of the statute 4 Ann. c. 16, § 4, which provides that 'it shall be lawful, for any defendant, or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead *as many several* matters thereto as he shall think necessary for his defence.'(c)

Under this statute, the defendant, in any English court of record, may, with leave of the court, plead as many different pleas in bar, (each being in itself *single*,) as he may think proper.(d) But though this statute allows the defendant to plead several distinct and substantive matters of defence, (in *several distinct pleas*,) to the *whole*, or *one and the same part* of the plaintiff's demand; yet it does not authorize him to allege more than *one* ground of defence, in *one plea*. Each plea must still be *single*, as by the rule of the common law.(e)

Whenever, the defendant pleads, in pursuance of this statute, more than one plea in bar, to one and the same demand, or thing, all of them, except the first, should (regularly) purport to be pleaded, *with leave of the court*—as in the following form, viz.: 'and for a further plea in this behalf, the said C. D. by leave of the court here for this purpose first had and obtained, according to the form of the

(c) Bac. Abr. *Pleas*, &c., K. 3; *Nauer v. Thomas*, 13 Allen, 579.

[A similar statute is in force in probably every State. See *Gilmore v. Nowland*, 26 Ill. 200.

Several defenses are allowable, whether in one plea or in several pleas. *Poling v. Maddox*, 41 W. Va. 779].

(d) 3 Black. Com. 308; Lawes' Pl. 27-8.

(e) Lawes' Pl. 131; 1 Chitt. Pl. 512, 513. [See *Brown v. Nichols, Shepard & Co.*, 123 Ind. 492, where the defenses were so involved and confused that it was impossible for the court to understand the theory upon which the party proceeded.

But an answer may complete itself by adopting or referring to matter contained in another answer. *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209; *Baldwin v. U. S. Tel. Co.*, 54 Barb. 505].

statute in such case made and provided, says ' &c. (f) This, or some similar form, seems necessary by the terms of the statute; which makes it lawful for the defendant, only 'with leave of the court,' to plead more than one plea. The omission of this formula, however, is held to be an *irregularity only*, and not error, nor cause for demurrer. (g)

This statute extends only to pleas *to the declaration*, and does not embrace *replications*, *rejoinders*, or any of the subsequent pleadings. (h) For in these later stages of the pleadings, the privilege of making several answers to the same thing, can seldom be necessary or useful. As to these pleadings, therefore, the common-law rule against duplicity still remains in full force. And therefore the plaintiff cannot, under this statute, *reply* two several matters to one *plea*, nor the defendant *rejoin* different matters to one replication. (i)

The plaintiff is at liberty, however, to reply *separately*, to each of the defendant's pleas—so that he may still plead as many replications, (each being itself single,) as there are separate *pleas* admitting of answers. For, according to the first principles of pleading, each party must have a right to answer, in some form, all that is alleged against him. (j)

(f) Lawes' Pl. 132; 2 Chitt. Pl. 421-2; Com. Dig. *Pleader*, E. 2; Story's Pl. 72, 76; [*Gormley v. Bunyan*, 138 U. S. 623, holding that the Supreme Court would not review the granting or refusing of such leave except in a case of gross abuse of discretion].

(g) Andr. 109; 1 Wils. 219; *Pearson v. Eames*, 3 N. H. 523.

No leave of court is required, in New York.—It is a matter of right. N. Y. C. C. P. § 507.

(h) Bac. Abr. *Pleas*, &c., K. 2; Com. Dig. *Pleader*, E. 2.

(i) Id.

(j) 1 Saund. 337, b. (n. 2.); [*Watriss v. Pierce*, 97 Mass. 232, 237].

Where a reply can, under the New York Code, be made at all, the plaintiff may, of course, reply *separately* to each separate matter, or cause, of counter-claim:—Or of defense, where, [on the application of] the defendant [the court] calls upon him to reply. [N. Y. C. C. P. §§ 514, 516]. *Vassear v. Livingston*, 13 N. Y. 248.

The statute is also limited, in construction, to such pleas of the defendant as go to *the action*, and does not extend to *dilatory* pleas.(k) For though the terms of the statute do not exclude pleas of the latter class; yet as these are not favored by the law; the court will not, in its discretion, give the defendant leave to plead two of them to the *same thing*.(l)

If any *one* of several pleas pleaded together, under this statute, is determined in the defendant's favor; it is a good bar to the action, or at least to so much of the plaintiff's demand, as the plea extends to; although all the others should be determined in favor of the *plaintiff*. For *one* good defence is as available, far as it extends, as two or more would be. If therefore, any one of the pleas, pleaded to any *one* count in the declaration, prevails, either on an issue in fact or in law; it is an effectual bar as to *that count*; and if any one plea to *the whole* declaration thus prevails, it bars the whole action.(m) When several pleas in bar are pleaded, in virtue of this statute, to one and the same thing or demand, *each* of them is treated, and operates, as if it were pleaded alone: it being an established rule, that one of them 'cannot,' in the language of Lord Ch. J. *Willes*, 'be taken in to *help* or *destroy* another;' but that 'every plea must stand or fall, *by itself*.'(n) And the opinion of Mr. J. *Buller* is expressed in terms almost literally the same.(o) No one of them, therefore, can have the effect of *dispensing with the proof* of what is denied by another.(p) Hence if the defendant

[Further, the reply may contain two or more distinct avoidances of the same defense or counter-claim. N. Y. C. C. P. § 517].

(k) 1 Sell. Pract. 275; Steph. Pl. 295.

(l) The terms of the New York Code seem to *include* demurrers; and as no leave of court is here required, the rule in the text would be inapplicable here.

(m) 2 Burr. 753; 1 Saund. 80. (n. 1.)

(n) *Willes*, 380. [*Manhattan Brick Co. v. Clark*, 34 Misc. 819].

(o) 1 T. R. 125—Acc. 5 Serg. & R. 411, per Duncan, J.

(p) 2 East, 426; 5 Ib. 463; *Currie v. Henry*, 2 Johns. 437; 2 Phil.

pleads, first the *general issue*, and then pleads specially matter in *avoidance*, which impliedly *confess* the declaration—(as if he pleads first, *non est factum*, and adds a special plea of *usury*, *duress*, *infancy*, *payment*, &c.; or pleads all these, in successive special pleas—or pleads first, *not guilty*, and then special matter of *justification* or *discharge*); the matter of avoidance thus pleaded, though *inconsistent* with the general issue, does not supersede the necessity of the plaintiff's proving his *declaration*.(q) For a contrary rule would defeat the very object of the statute—which manifestly is, to enable the defendant, not only to *plead*, but on the trial, to *rely upon*, as many different defences, as he may choose to put upon the record. But if a plea in avoidance were held to destroy the effect of the general issue; it is manifest that the statute, allowing the defendant to plead *both* pleas, would be altogether nugatory. And the effect would plainly be the same, if one of two inconsistent pleas in *avoidance* (as *payment*, and *accord and satisfaction*, both pleaded to the whole demand), were held to *disprove the other*. Indeed, it appears clear, that the *benefit* or *privilege* intended to be conferred upon the defendant, by this statute, must be lost to him, unless his several pleas are treated, and allowed to operate, as *entirely independent of each other*.(r)

Many questions have heretofore arisen, as to *what* several defences in bar may be pleaded together, under this statute, to one and the same demand; and a copious catalogue of such pleas as may, and of such as may not, be thus pleaded together, is presented in Comyns's Digest, *Pleader*, E. 2. For an opinion was formerly entertained, that *mere incon-*

Ev. 97, n. a.; 1 Stark. Ev. 296, n., 389, n.; 1 Chitt. Pl. 543; 5 Taunt. 233; *Cilley v. Jenness*, 2 N. H. 89.

(q) [*Watriss v. Pierce*, 97 Mass. 232, 237; *Bartlett v. Prescott*, 41 N. H. 493].

(r) The New York rule is according to the text. *A denial and an avoidance* may be put in, to the *same* cause of action; and the plaintiff must *prove* the allegations, which are denied.

sistency between two given pleas was a decisive objection to their being pleaded together, under the statute. But if such a rule should prevail, the statute would, in a great measure, be practically repealed. For the *general issue*, which is almost universally the first of the several pleas pleaded together under the statute, is, on strict common-law principles, inconsistent with almost *every special* matter of defence *what-ever(s)* since the general issue *denies*, while a plea in avoidance *admits*, the truth of the declaration. At this day, however, it appears to be generally understood as a sound rule, in the construction of the statute, that *mere inconsistency*, between two or more pleas in bar, is no objection to their being pleaded together (*t*): a rule, which would appear to follow of course from one before laid down, viz.: that each of several pleas, thus pleaded together, is to be considered as *independent* of all the others, and to operate as if pleaded *alone*. (*u*)

And it seems now, that when the several matters of defence, proposed to be pleaded, all require the same mode of trial (as by jury), the defendant may plead, with the *general issue*, *any special plea*, except that of *tender*. (*v*) The reason, why

(*s*) This proposition, as applied to actions *on the case*, and especially the action of *assumpsit*, must be understood with some modification. In these *equitable* actions, which were unknown to the ancient common law, the general issue is deemed consistent with, and comprehends many matters of *mere avoidance*. See *infra* GENERAL ISSUE.

(*t*) 1 Chitt. Pl. 540-542; 2 Ib. 431, n. d.; 4 T. R. 194; 13 East, 255; 2 Phil. Ev. 97, n. a.; Com. Dig. *Pleader*, E. 2; 1 Sell. Pract. 299; 5 Taunt. 340; 3 Bing. 635; *Merry v. Gay*, 3 Pick. 388.

(*u*) [*Recknagel v. Steinway*, 58 App. Div. 352; *Potter v. Earnest*, 45 Ind. 416]. This reasoning seems *entirely conclusive*. Such must be the rule under the New York Code. And *Mr. Justice Harris*, in *Hollenbeck v. Clow*, 9 How. Pr. 290,—though he properly repudiates some decisions,—does not go as far as the principle would bear him. *Mere inconsistency*, between two such parts of an answer, is *no reason* why both should not stand;—no matter how absolute that inconsistency.

(*v*) 4 T. R. 194; 5 Ib. 97; 1 Chitt. Pl. 541; *Steph. Pl.* 293; [*Roe v. Rogers*, 8 How. Pr. 356.

tender cannot be pleaded with the general issue, is not, however, merely or chiefly, that it is *inconsistent* with that issue (for so, generally, are all special pleas in bar); but that the former admits the debt or damages demanded to be still *due*, and in its effect goes only in bar of the *costs*, and the nominal damages of detention—while the general issue and other pleas in bar, in general, deny any existing liability or legal duty on the part of the defendant. Actions on *penal statutes* are, by the express words of the statute of *Anne*, excluded from its operation.(w) And it is held, that the statute does not extend to actions at the suit of the King.(x)

Neither at common law, nor under the statute of *Anne*, can a party *plead, and demur*, to the same matter or thing (y)—not at common law, by reason of the *incongruity* between the plea and the demurrer; not under the statute, because that only enables the defendant to *plead* several matters, &c.: whereas a demurrer merely assigns a reason for *not* pleading, and is not considered as a *plea*.(z)

A general denial, or a general issue, and tender, whether of the whole or of part of the plaintiff's demand, cannot be pleaded together. To set up a tender necessarily admits that something was due, and so is clearly repugnant to a denial that anything is due. *Hatch v. Thompson*, 67 Conn. 74. So as to denial of a contract and a plea of part performance. *Lewis v. Acker*, 11 How. Pr. 163].

(w) 2 Stra. 1044; 4 T. R. 701; 1 Chitt. Pl. 541; 2 Wils. 21; Barnes, 365; Cas. Temp. Hardw. 262.

(x) Parker's Rep. 1; Forrest's Rep. 57, where it is said that the case in Com. R. 422, is misreported.

(y) Bac. Abr. *Pleas*, &c., K. 1, N. 1.

[So under the Code provision as to several pleas. *Auburn & Owasco Coal Co. v. Leitch*, 4 Den. 65].

(z) So held under the Code. (*Munn v. Barnum*, 12 How. Pr. Rep. 563.) But where, to reach a ground, which is called a cause for demurrer, the allegation of *new matter* is required; and so (new matter being improper, in a demurrer, *Coe v. Beckwith*, 31 Barb. 344), the defendant is compelled to *answer*; can he, (on principle,) take, in his answer, *that ground with* an answer on the merits?—It may depend on the *nature* of the *particular ground* thus in the answer.—

But double pleading (or duplicity), when not warranted by the statute, is only a fault in *form*; and therefore, under the statute, 27 *Eliz. c. 5 (a)*, no advantage can be taken of it, except by *special demurrer*. (b) For the ground of objection to such pleading is, not that it is *deficient in substance*; but that it contains *more* than is necessary. (c)

But though, where two distinct and sufficient matters, not warranted by the statute to be pleaded together, are pleaded to the same point, by one party, the other may demur for that cause; yet if, instead of demurring, he *pleads over*; he must answer *both* of them: otherwise, the part unanswered will remain decisive against him. (d) And in such a case, an answer (in itself single), to *each* matter, does not constitute *duplicity*: for the two answers are not to *one and the same* point, but to two *different* points. If, for example, to a plea of *infancy*, in *assumpsit*, the plaintiff

Some causes,—(really in *abatement*, not properly demurrers,)—may be so joined. *Sweet v. Tuttle*, 14 N. Y. 465, 469.

(a) For this statute, see *Demurrer*.

(b) *Bac. Abr. Pleas, &c.*, K. 1; 2 *Lill. Ab.* 397; 1 *Saund.* 337, b. (n. 3.); *Com. R.* 115; *Com. Dig. Pleader*, E. 2; 1 *Wils.* 219; 1 *Bos. & P.* 415, 416; *Lawes' Pl.* 132-5; *Otis v. Blake*, 6 *Mass.* 337-8; *Joy v. Simpson*, 2 N. H. 180; *Tarleton v. Wells*, 2 N. H. 308; [*Taylor v. Knapp*, 25 *Conn.* 510; *Cent. of Ga. R. v. Banks & Fortson*, (Ga.) 58 S. E. 352; *Willey v. Carpenter*, 64 *Vt.* 212 (an objection to the admissibility of evidence will not take the place of a demurrer. *Giffen v. Barr*, 60 *Vt.* 599. The special demurrer must show the grounds of the objection. *Briggs v. G. T. R. Co.*, 54 *Me.* 375.

There is no special demurrer in Virginia except as to dilatory pleas. *Grayson v. Buchanan*, 88 *Va.* 251].

(c) In New York, under the Code, a motion to *strike out* one, is the only remedy. If both are allowed to remain, *both must be tried*,—by the principle of the next section. How, then, can there be any claim to make the defendant, at the trial, *elect* which ground of answer to proceed upon?—He is entitled to *both*. [In some States a motion may be made to separate the answer into paragraphs. In Alabama a motion to strike out, or a special explanatory charge. *Bolling & Son v. McKenzie*, 89 *Ala.* 470. And see *Chesapeake & N. Ry. v. Crews*, (Tenn.) 99 S. W. 368].

(d) 1 *Vent.* 272; *Bac. Abr. Pleas, &c.*, K. 1.

replies *necessaries*, and also a *promise* after full age; the defendant, if he does not demur for the duplicity, must give a substantive, single answer to the allegation of necessities, and another, to that of the subsequent promise. For if the rejoinder should answer but *one* of these allegations; the other, remaining unanswered, would destroy the plea in bar.

The rule, requiring a demurrer, for duplicity, to be special, does not extend to declarations, in which there is a *misjoinder of causes of action*—or in other words, to cases, in which the plaintiff joins, in different counts in one declaration, different and incongruous causes of action, as substantive and *distinct* grounds of recovery: as, where he thus joins *contract and tort*, or *case and trespass*. Such a misjoinder has been heretofore shown to be an incurable fault, and consequently ill, on *general* demurrer or on motion in *arrest of judgment*, after verdict, or on writ of error.(e)

(e) 1 Salk. 10; Bac. Abr. *Pleas*, &c., B. 3; 1 T. R. 274; 1 H. Black. 108; 2 Bos. & P. 424; 7 Barn. & Cresw. 444; 12 Johns. 349; 11 Mass. 59, 60; 1 M. & S. 360.

CHAPTER IV.

DEPARTURE.

THERE MUST BE NO DEPARTURE IN PLEADING.—*Departure* in pleading is the dereliction of an antecedent ground of complaint, or defence, for another, *distinct from*, and *not fortifying*, the former. (*a*)

(*a*) 3 Black. Com. 310; Co. Litt. 303, b.; 304, a.; Finch's Law, 50, 391; Lawes' Pl. 162; Bull. N. P. 17; *Brine v. Gt. West. R. Co.*, 2 B. & S. 409; [*Surety Co. v. Bragg*, 63 Kan. 291, 296; *United States v. Morris*, 1 Paine 209; *Mayes v. Stephens*, 38 Oreg. 512].

The New York Code, § 514, would seem to recognize this principle, in saying that the plaintiff, (in a reply,) may allege 'any new matter, *not inconsistent with the complaint*;'—i. e., of course, in a material point. Yet it has been said that *departure* is *not* ground for demurrer. 3 Kern. 83. But the same case, at page 87, says in the prevailing opinion, that a *departure* would, under the Code, be a fatal defect, on demurrer. This is certainly the better opinion. See *infra*.

Serjeant Williams defines departure as follows: "A departure in pleading is said to be, when a man quits or departs from one defense which he has first made, and has recourse to another it is when his second plea does not contain matter pursuant to his first plea, and which does not support and fortify it." 2 Wms. Saund. 84 a, 84 b; 2 Wms. Notes to Saund. 273, 274, quoted by Mellor, J., in *Brine v. Great Western Ry. Co.*, 2 B. & S. 409; Co. Litt. 304 a; [*Hossie v. Kempton*, 77 Minn. 462, 465].

A departure obviously can never take place till the replication.

Where to a declaration for goods sold and delivered the defendant pleaded infancy, to which the plaintiff replied on equitable grounds that at the time of contracting the debt the defendant, knowing his true age, falsely and fraudulently represented to the plaintiff that he was of full age, whereby the plaintiff, having no knowledge, or means of knowledge, as to the defendant's age, was induced to enter

This is a fault in all pleading. For, as has been heretofore explained, each succeeding stage of the pleadings, on each side, must fortify, or go in support of, what has been previously pleaded on the same side. (b) Thus, the replication must support the *declaration*; the rejoinder, the *plea in bar*, &c. For otherwise, the parties might, at pleasure, *change* one cause of action, or one ground of defence, for another, entirely foreign to the first. Thus, if to debt or assumpsit, the defendant pleads *infancy*, and to a replication of *necessaries* rejoins *duress*, *payment*, *release*, *usury*, &c.; the rejoinder is a *departure*, and a good cause of demurrer—though either of the matters alleged in it, would have been a good bar, if *first* pleaded as such. (c)

into the contract and to supply the goods, it was held, that the replication was bad as a departure, and also as not alleging facts to avoid the defendant's plea on equitable grounds. *Bartlett v. Wells*, 1 B. & S. 836; *S. P. DeRoo v. Foster*, 12 C. B. N. S. 272. As illustrating the nature of this defect in pleading see the following cases: *West v. Nibbs*, 4 C. B. 172; *Smith v. Marsack*, 6 Id. 486; *Elliot v. Von Glehn*, 13 Q. B. 632; *Morris v. Walker*, 15 Id. 589; *Callow v. Jenkinson*, 6 Exch. 666; *Meyer v. Haworth*, 3 N. & P. 462; *Wilders v. Stevens*, 15 M. & W. 208; *Perry v. Smith*, C. & Marsh. 554; *Rixon v. Emary*, L. R. 3 C. P. 546; *Kitson v. Hardwicke*, L. R. 7 C. P. 473; *Hooper v. Marshall*, L. R. 5 C. P. 4; *Wilson v. Codman*, 3 Cranch, 193; *Stidley v. Brown*, 4 Pick. 139; *Hagood v. Houghton*, 8 Id. 451.

(b) Id.; 2 H. Black. 280; 1 Stra. 422; Reg. Pl. 112.

["This rule," said Judge Torrance in *Logiodice v. Gannon*, 60 Conn. 81, 84, "was founded in good sense, and in substance it forms a part of our present system, although the violation of it is not attended, perhaps, with the same consequences as under the old system. Its violation leads to uncertainty, obscurity and confusion in pleadings, and these results our present law seeks to avoid by giving the court power to strike out the objectionable pleading on motion of the opposite party, and by giving ample power, under the proper circumstances, to the parties and to the court to amend the 'case or defense first made.'"]

(c) [In *Durbin v. Fisk*, 16 Ohio St. 533, the plaintiff, in his petition, asserted the mere legal rights of the holder of a promissory note, and then, in his replication sought to be subrogated to the rights of a creditor whose claim he had paid. The court said: "If

In *assumpsit*, brought by an executor, on an alleged promise to his *testator*, if the defendant pleads the statute of *limitations*; a replication alleging a promise, within six years, to the plaintiff himself, is a departure (*d*): the promise *replied*, not going in support of that *counted upon*. To justify a recovery, on the second promise, it should have been *declared on*.

If the defendant pleads in bar a *feoffment in fee simple*, and in his rejoinder varies his title, or the mode of acquiring it,—as by alleging a conveyance by *lease and release*, or a gift *in tail*; the rejoinder is a departure (*e*): since it substitutes a *new ground of defence*, for that first pleaded.

Thus also, when the matter, first alleged as the ground of action or defence, is pleaded as at *common law*, any subsequent pleading by the same party, supporting it by a *particular custom*, is a *departure*. (*f*) For example, if in covenant broken, against an apprentice, upon his indenture of apprenticeship, the plaintiff declares in common form, (i. e. *as at common law*,) and the defendant pleads *infancy*; a replication of the *custom of London* (under which an infant may bind himself, as apprentice), is a *departure*; inasmuch as it abandons the legal foundation of the suit, as

his replication could be regarded as seeking equitable relief under the facts there stated, it is a total departure from the petition. A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can only be done by amendment of the petition." See *Savage v. Aiken*, 21 Neb. 605, and *infra* REPLICATION.]

(*d*) Willes, 27; 1 Salk. 28; 3 East, 409; 3 B. & A. 631-2; 3 Har. & McHen. 152; *Jones v. Moore*, 5 Binn. 573; *Lindsay v. Jamison*, 4 McCord, 93; *Fisher's Executor v. Duncan*, 1 Hen. & Munf. 563;—and *vide* 1 B. & C. 248; [And see *Holmes v. Seashore Electric Railway Co.*, 57 N. J. L. 502]. *Cont. Baxter v. Penniman*, 8 Mass. 133; *Little v. Blunt*, 9 Pick. 493; *Buswell v. Rody*, 3 N. H. 467; [*Preston v. Cutler*, 64 N. H. 464].

(*e*) Co. Litt. 304; Bac. Abr. *Pleas*, &c., L.

(*f*) Finch's Law, 392; Bac. Abr. *Pleas*, &c., L.; 1 Keb. 376, 469, 512; 1 Lev. 81.

laid in the declaration, for another, distinct from, and independent of it. The plaintiff should have declared upon the custom.

Again, a declaration or plea, asserting a right at *common* law, is not fortified by the subsequent allegation of a right created by *statute*. If therefore, to an action of trespass, laid in common form, for taking the plaintiff's cattle, the defendant justifies the taking of them *damage feasant*, by distress; and the plaintiff replies, that the defendant *drove them out of the county*, the replication is a departure (*g*), for the same reason, as in the last case. The plaintiff, in this case, should have *founded* his action upon the statutes.

But if the plaintiff declares upon a statute, and the defendant pleads that it is repealed; a replication, that it has been *revived* by a subsequent act, is no departure. (*h*) Here the replication fortifies the ground taken in the declaration. For the reviving act gives renewed effect to the *first*, on which the action is founded.

If, in covenant broken, the defendant pleads performance in general terms, and the plaintiff replies non-performance of a particular act; a rejoinder, that the defendant was *ready* to perform, and *tendered performance*, and that the plaintiff *prevented it*, is a departure from the plea (*i*):

(*g*) Bac. Abr. *Pleas*, &c., L.; 3 Lev. 48; Finch's Law, 392-3.

This was not actionable by the common law, but was made so by Stat. 52 Hen. III, & 1 & 2 Ph. & Mary, ch. 12.

(*h*) 1 Lev. 81; Bac. Abr. *ud. sup.*—*Vide* Yelv. 14, 15.

[So under the codes, the plaintiff, in his reply, may set up new matter, not inconsistent with the complaint, to answer affirmative matter pleaded in the answer. *The Aetna Life Ins. Co. v. Neessen*, 84 Ind. 347; *Hunter Milling Co. v. Allen*, (Kan.) 88 Pac. 252; *Hallner v. Union Transfer Co.*, (Neb.) 112 N. W. 334; *Van Bibber v. Fields*, 25 Oreg. 527, 530; *Coombs Com. Co. v. Block*, 130 Mo. 668 (a reply to a counter-claim); *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 67; *Erickson v. McLellan & Co.*, (Wash.) 91 Pac. 249. And see *infra*, NEW ASSIGNMENT].

(*i*) Co. Litt. 304, a.; Bac. Abr. *Pleas*, &c., L.; 1 Sid. 10. *Vide Darling v. Chapman*, 14 Mass. 103.

performance, and *tender*, and *refusal*, being distinct and inconsistent grounds of defence. The matter rejoined should have been pleaded in the first instance.

But varying in an *immaterial* point, from what has been before alleged on the same side, is *no departure*: as a departure consists in changing the original *ground* or *foundation* of the action, or defence. Thus, in assumpsit on a parol promise, if the promise is laid *more than six years* before the commencement of the suit, and the defendant pleads the statute of *limitations*; the plaintiff may reply a promise *within* six years.(j) For as the day, laid in the declaration, is *immaterial*; the replication, in stating a different day, cannot be considered as presenting a *new ground* of action.(k)

So too, when the promise is laid, as in the last case, and the *place* laid in the declaration is immaterial, a replication, (in answer to a plea of the statute of limitations) of a *different place*, in order to bring the case within the saving in favor of persons 'beyond the seas,' is, for the same reason, *no departure*.(l)

When the *gravamen*, or cause of action, is stated *generally* in the declaration, and the defendant pleads an evasive plea (m), a more particular statement of the cause of action,

(j) 2 Saund. 5, b. (n. 3.); 1 Ib. 299, (n. 6.); 1 Salk. 222, 223; Cro. Car. 245, 333; 1 Lev. 110, 143; 1 Stra. 21; 1 Keb. 566, 578; 10 Mod. 348; 16 East, 420; Hall v. Cushing, 9 Pick. 494.

(k) Under the New York Code, the *new* promise may be proved, *without* being averred. *Esselstyn v. Weeks*, 12 N. Y. 635.—Might not this operate as a *fatal surprise*? And how is it consistent with a rule that the party must *allege the facts* on which he relies? [See *Matthews v. Hamblin*, 28 Miss. 611, 614]. The true rule must be otherwise.

(l) 1 Lev. 143; 10 Mod. 349.

(m) Any plea, which makes a new assignment necessary, is called an *evasive plea*—i. e., as I understand it, a special plea, which, though apparently avoiding the *whole gravamen*, or ground of complaint, as laid, generally, in the declaration, does still not avoid the *particular* ground or cause, on which the plaintiff actually founds his right of

by way of *new assignment* in the replication, is no departure.(n) For a new assignment, when properly made, does not substitute a *new* cause of action, for that alleged in the declaration; but merely states the original one with more *particularity*, in order to repel the effect of the plea—or, (as may sometimes be necessary to the same end) assigns as a *substantive* ground of damages, what the declaration has alleged only as *aggravation*.

Thus if, to an action of any kind, the defendant pleads in bar a *former recovery*, for the same cause, when in fact it was for a *different cause of the same kind*; the plaintiff may, by a new assignment, state more particularly the *specific* cause of action, on which his complaint is founded, and show that it is a *different* one from that to which the plea applies.(o)

Thus also, if to an action against a sheriff, for an *escape*, he pleads recaption on fresh suit, before action brought, (which is a good defence for a *negligent*, though not so for a *voluntary* escape); the plaintiff may, by way of new assignment, reply a *voluntary* escape; and it will be *no departure*. It fortifies the declaration.(p)

recovery; as in the examples, which follow in the text. [See *United States v. Larkin*, 153 Fed. 113].

(n) 3 Black. Com. 311; Bull N. P. 17; Lawes' Pl. 164-5; 3 Wils. 20; 2 Saund. 5. a. b. (n. 3.); Willes, 218. [It simply fulfils the office of pleading by giving precise information, *Soudont v. Wadhams*, 46 Conn. 218, 224.

There is no new assignment by that name under the code. See *Stewart v. Wallis*, 30 Barb. 344. But this method of pleading in the replication is of frequent occurrence (*Bishop v. Travis*, 51 Minn. 183), as indeed is natural, since under the codes and practice acts, as at common law, it is unnecessary, and indeed improper, to anticipate defenses in the complaint (*Conklin v. Botsford*, 36 Conn. 105; *Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471; *Hastings v. Speer*, 34 Pa. Sup. Ct. 478)].

(o) Id; 2 Chitt. Pl. 653. n. (e.); 9 Wentw. 10.

(p) 1 Vent. 211, 217; 2 T. R. 126; Bac. Abr. *Escape*, H. [So if the complaint sets out the execution of an instrument, the replication may allege, in explanation of the manner of execution, that the de-

By the common law, departure is a good cause of *general demurrer*.(q)

Yet a *verdict*, in favor of him who makes a departure, cures the fault, if the matter, pleaded by way of departure, is sufficient answer, *in substance*, to what is before pleaded by the adverse party; i. e. if it would have been sufficient, provided he had pleaded it, in the *first* instance.(r) For

defendant ratified, there having been a plea of no execution. *Cravens v. Gillilan*, 73 Mo. 524].

(q) Com. Dig. *Pleader*, F. 10; 2 Wills. 96; 1 Ib. 122; Willes, 638; 4 T. R. 504; 2 Saund. 84. d. (n. 1.); 1 Ib. 117; 1 Salk. 221-2; T. Ray. 22. 94; 1 Stra. 422; 10 Johns. 262; *Keay v. Goodwin*, 16 Mass. 1; 2 N. H. 180, 308; 6 N. & M. 407, note (b); *Brine v. Gt. West. Railway Co.*, 2 B. & S. 402. [And see, *George v. Mobile & O. R. Co.*, 109 Ala. 245; *Moore v. Stevens*, 42 N. H. 404; *Heath v. Doyle*, 18 R. I. 252].

Some, however, have supposed that under the statute 4 & 5 Ann. ch. 16, it is aided, except on *special demurrer*. (Com. Dig. *Pleader*, F. O.; 1 Saund. 117. (n. 3.); 1 Chitt. Pl. 623. n. (e.) But this opinion seems clearly opposed to the authorities, last before cited; and on principle, the fault appears to be matter of *substance*: Inasmuch as it is an entire abandonment of the ground of action, or defence, first taken by the pleader, and for which he has, by law, no right to substitute any other. And see 2 Saund. 84, d. (n. 1.) where Mr. Sergeant *Williams* retracts the opinion, that the fault is but formal; though he had previously advanced that opinion in 1 Saund. 117, (n. 3.)

[A motion to strike out is proper under the present practice in many states. *Logiodice v. Gannon*, 60 Conn. 81; *Surety Co. v. Bragg*, 63 Kan. 291; *Brown v. Baker*, 39 Oreg. 66. Or the defendant may have judgment on the pleadings, the defect appearing on the face of the pleadings. *Hoxsie v. Kempton*, 77 Minn. 462.

In *Frank Brewing Co. v. Hammersen*, 22 App. Div. 475, it was held that the authority to strike from the reply, on motion, new matter inconsistent with the complaint, exists irrespective of the express provision of the code].

(r) 1 Lill. Ab. 444; T. Ray. 86; 2 Saund. 84; Ib. 84. d. (n. 1.); 1 Keb. 566; 1 Lev. 110; Tidd, 689; 1 Chitt. Pl. 623; [*Beard v. Hand*, 88 Ind. 183; *Whitney v. National Masonic Acc. Ass'n.*, 57 Minn. 472; *Ankeny v. Clark*, 148 U. S. 345, 355. And see *Brown v. Baker*, 39 Oreg. 66, 71, where it was held that the objection must be deemed waived because the motion there made and the demurrer were insufficient to call the court's attention to the defect, the reasons not being specifically stated].

after such a finding, it will necessarily appear, from the *whole* record taken together, that he is, in law, entitled to judgment. For example: The defendant, in *assumpsit*, pleads *infancy*; the plaintiff replies *necessaries*; and defendant rejoins a *release*. Now, if issue is taken upon the rejoinder, and a verdict found for the defendant, he must have judgment. For by the finding, it appears conclusive upon the record, that there is no right of action: whereas, upon a *demurrer* to the rejoinder, this result could not thus appear. For the release being *ill pleaded*; a demurrer would not confess it.

DIVISION III.

THE DECLARATION.

CHAPTER I.

GENERAL RULES.

THE DECLARATION, OR COUNT, as has been before stated, is an *amplification or exposition of the original writ*, with the addition of all necessary circumstances, not expressed in the writ (*a*): in other words, it is a detailed statement of the complaint, or cause of action, which, in the writ, is presented in a more general form.

The terms 'declaration' and 'count' are frequently used, especially in the older books, as convertible terms; but practice has introduced the following distinction: where the plaintiff's complaint embraces only a *single* cause of action, and he makes only *one* statement of it, that statement is called, indifferently, a 'declaration,' or a 'count;' though the former term is the more usual, at the present day. But where the suit embraces two or more causes of action, (each of which requires, of course, a distinct statement); or when the plaintiff makes two or more different *statements* of one and the same cause of action; each several statement is called a *count*, and all of them, collectively taken, constitute the *declaration*.

(a) Co. Litt. 17, a.; 303, b.; 3 Black. Com. 293; Com Dig. *Pleader*, C. 7; Bac. Abr. *Pleas*, &c., B. 1.

SEVERAL COUNTS.—In all cases, however, in which there are two or more counts—whether there is actually but *one* cause of action, or *several*—each count purports, *upon the face of it*, to disclose a distinct right of action, unconnected with that stated in any of the other counts: so that, upon the face of the declaration, there appear to be as many different *causes of action*, as there are counts inserted. And therefore, whether a plaintiff, whose declaration contains more than one count, claims a recovery upon *one* right of action only, or upon *several*, cannot appear, except in evidence. *Practically*, however, the defendant can seldom be left in doubt on this point.

One object proposed, in inserting two or more counts in one declaration, when there is in fact but *one cause* of action, is, in some cases, to guard against the danger of an *insufficient statement* of the cause, where a doubt exists as to the *legal sufficiency* of one or another of two or more different modes of declaring. But the more usual end proposed, in inserting more than one count, in such a case, is to accommodate the *statement* of the cause, as far as may be, to the possible state of the *proof* to be exhibited on the trial: or to guard, if possible, against the hazard of the *proof's varying* materially from the statement of the cause of action: so that if one or more of the several counts should not be adapted to the evidence, some other of them may be so. (b)

(b) 3 Black. Com. 295; [*Rawlinson v. Shaw*, 117 Mich. 5, 9.

In *Mead v. Randall*, 111 Mich. 268, plaintiff sued for alienation of his wife's affections, and properly, as it was held, joined a count alleging that defendant assaulted and debauched the wife, whereby her affections were alienated, &c.; and a count charging that defendant seduced the wife, whereby her affections were alienated, &c. The court distinguished, *Perry v. Lovejoy*, 49 Mich. 529, where it was held that, in an action for alienating the wife's affections, proof of criminal conversation was inadmissible where the declaration contained no averment of adulterous intercourse].

At common law the declaration might join several causes of action in several counts, provided they were between the same parties,

The plaintiff has, in every case, a *right* to insert, in his declaration, as many counts, (each one being in itself single),

in the same rights, and framed in the same form of action. *Shepherd v. Shepherd*, 1 C. B. 849; *Mulcahy v. The Queen*, L. R. 3 H. L. 322. And formerly, when variances between the evidence and the record could not be amended at *nisi prius*, it was necessary to provide against a variance by framing several counts founded on the same cause of action, to meet every possible contingency which might arise upon the evidence.

In practice it is advisable to insert in a declaration as many different counts as will fairly include the various causes of action resulting from all the facts relied upon. But it is useless and objectionable to multiply counts by stating the same cause of action in various ways.

It is to be observed, that whether the subjects of several counts be *really* distinct, or identical, they must always *purport* to be founded on distinct causes of action, and not to refer to the same matter; and this is effected by the insertion of such words as "other," "the further sum," etc., and by laying a different *time* in each count by the word "afterwards," to obviate the difficulty, through the fiction that the cause of action thus stated is new and distinct. This is evidently rendered necessary, by the rule against duplicity—which, though evaded as to the declaration, by the use of several counts, in the manner here described, is not to be directly *violated*. *Campbell v. The Queen*, 11 Q. B. 799, 810, 811; Stephen Pl. 2d ed. 319.

The misjoinder of counts renders the whole declaration bad upon demurrer, or upon error, or in arrest of judgment. Thus, counts charging a defendant as executor or administrator cannot be joined with counts charging him personally in his own right. *Brigden v. Parkes*, 2 B. & P. 424; *Rose v. Bowler*, 1 H. Bl. 108; *Jennings v. Newman*, 4 T. R. 347; *Corner v. Shew*, 3 M. & W. 350; *Ashby v. Ashby*, 7 B. & C. 444; *Brown v. Webber*, 6 Cush. 560. But counts on promises to the testator, and to the executor in his representative capacity, may be joined, because in either case the judgment is the same. *Sullivan v. Holker*, 15 Mass. 374. Shaw, C. J., in *Brown v. Webber*, 6 Cush. 571. But if the declaration is not demurred to, the consequences of the misjoinder may be avoided by entering a *nolle prosequi* to any count or counts, and thus obviating the objection. *Kitchenman v. Skeel*, 3 Exch. 49. Or if at the trial the damages are calculated with reference to one count only the verdict may be entered as to that count alone; and if a general verdict has been given, it may be amended, and thus the misjoinder will be cured. *Rightly v. Birch*, 2 M. & S. 533; *Commonwealth v. Packard*, 5 Gray, 103.

as he pleases (c); and in actions *on the case* (especially in *assumpsit*), it is the usual practice to insert, though often unnecessarily, two or more. (d)

(c) Lawes' Pl. 73. [It is no more necessary to allege facts under the code than it was at the common law. *Solomon v. Vinson*, 31 Minn. 205. So the provision requiring in a complaint a plain and concise statement of the facts constituting the cause of action without repetition does not prohibit the statement of a single cause in different counts so as to meet the requirements of the proof. *Brinkman v. Hunter*, 73 Mo. 172. See also *Newman v. Grant*, (Mont.) 92 Pac. 43.

The plaintiff may refer from one to another count, so as to make each count complete in itself. *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546.]

(d) 3 Black. Com. 295; Lawes' Pl. 73.

[The common counts are not favored but their use is allowed even under the reformed procedure which requires that the complaint shall state the facts constituting the cause of action. *Doherty v. Shields*, 86 Hun, 303, 307; *Robinson v. Amer. Linseed Oil Co.*, 147 Fed. 885; (a count on contract and on a *quantum meruit*). When the money counts could have been used formerly the plaintiff may still resort to that form. *Goodman v. Alexander*, 165 N. Y. 289, 294. And see *Cripple Creek Min. Co. v. Brabant*, 37 Col. 423, approving several counts where there is reason to believe that it is not safe to go to trial on a single statement.

Under the Connecticut Practice Act the common counts constitute a sufficient complaint so far as not to be demurrable after the plaintiff has filed a proper bill of particulars of the items of his claim. A proper trial of the case may require the filing by way of amendment of a substituted complaint or complete statement of facts constituting the cause of action. Then the common counts drop out. *Hoggson & Pettis Mfg. Co. v. Sears*, 77 Conn. 587. When a proper bill of particulars is filed only such of the common counts as are applicable thereto remain in the case. *Kelsey v. Punderford*, 76 Conn. 271. The bill of particulars is in strictness no part of the pleadings (*Forbes v. Rowe*, 48 Conn. 414), and the want of necessary allegations in the pleadings cannot be thus supplied. Such a complaint can be amended under the rules controlling an amendment to any complaint. *Dunnett v. Thornton*, 73 Conn. 1.

The common counts are not appropriate to recover damages for breach of a contract. *Bean v. Elton*, 44 Ill. App. 442.

Where a contract has been fully performed and nothing remains but the payment of money the common counts may be used (*Flint*

And if any one of several counts in a declaration be proved, (although the proof of all the others should fail); the plaintiff must recover upon it, unless it be radically insufficient in law.^(e) For by maintaining *one* good count, he establishes a complete right of recovery. And for the same reason, if on demurrer to the *whole* declaration, any one of the counts is adjudged sufficient in law; the plaintiff will be entitled to judgment on that count—though all the others be defective.^(f)

ALL ESSENTIAL FACTS MUST BE ALLEGED.—The declaration, being the statement of those facts on which the plaintiff founds his right of recovery, must of course allege *all that*

etc. *R. Co. v. Circuit Judge*, 108 Mich. 80; *White v. Taylor*, 113 Mich. 543), whether the contract was oral or written (*Record Publishing Co. v. Merwin*, 115 Mich. 10; *Mayer v. Mitchell & Co.*, 59 Ill. App. 26). So that where the plaintiff relies solely on the contract he can recover on the common counts only when he shows a full performance on his part. *Parmly v. Farrar*, 169 Ill. 606. Money paid without consideration may be recovered on the common counts. *Murphy v. McGraw*, 74 Mich. 318.]

Where counts, clearly superfluous, were inserted, they could, in the old *English* practice, be struck out by the order of the court, and the plaintiff be compelled to pay the costs. *Cas. Temp. Hardw.* 129; *Lawes' Pl.* 61, 73.

[Where all the facts constitute only one continuous transaction they should be set out in one count. *Dawson v. March*, 74 Conn. 498. And in a doubtful case the plaintiff will not be required to separate and set out as distinct causes of action facts which he claims constitute together but one cause. *Woods v. McClure*, 42 Misc. 8, construing N. Y. C. C. P., § 483, requiring distinct causes of action to be separately paragraphed and numbered.]

(e) *Com. Dig. Pleader*, Q. 3; 3 Black. Com. 295; 1 Saund. 286 (n. 9.); 2 Ib. 171, d. (n. 1.); 380, (n. 14.); 1 Mod. 271.

(f) [*Jensen v. Wetherell*, 79 Ill. App. 33; *A. E. Johnson Co. v. White*, 78 Minn. 48; *Fersts v. Powers*, 64 S. C. 221; *Trump v. Coal & Coke Co.*, 46 W. Va. 238, 240; *Weed v. United States*, 65 Fed. 399.

The same rule applies to a demurrer to an answer which contains one count. *City of Tell City v. Bielefeld*, 20 Ind. App. 1; *Ross v. Duffy*, 12 N. Y. St. Rep. 584, relying on *Hale v. Omaha Bank*, 49 N. Y. 1626.]

is essential to his right of action.(g) For he can recover only *secundum allegata et probata*; and can legally

(g) *Bac. Abr. Pleas, &c.*, A. B. 1; *Doct. Pl.* 85. [That is to say, every fact that he will be called upon to prove at the trial. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429; *Nat'l Citizens' Bank v. Toplitz*, 178 N. Y. 464; *Lent v. N. Y. & Mass. R. Co.*, 130 N. Y. 504; *Schofield v. Loscher*, 72 N. Y. 491 (consent of court to bring suit); *White v. Joy*, 13 N. Y. 83 (appointment of one suing in a representative capacity); *Putnam v. Lamphier*, 36 Cal. 151; *Lincoln Nat. Bk. v. Virgin*, 36 Neb. 735.

In a declaration the pleader should set out the facts which constitute his cause of action logically, and in their natural order, showing his right, the injury, and the consequent damage. If it does not disclose a cause of action, no evidence can be introduced in support of it. *Williams v. Raper*, 67 Mich. 427, 429. A declaration which avers every fact material to be established in order to entitle plaintiff to recover, is sufficient. *Robinson v. Watson*, 101 Mich. 466. There is nothing in the rules of pleading in any State which requires or encourages the needless repetition of allegations which are so referred to as to be plainly understood. Good pleading requires reasonable certainty as to the pleader's meaning, but there is no especial legal advantage in a multitude of words. See *Ayres v. Toulmin*, 74 Mich. 44.

Speaking of an action for a malicious wrong, the court, in *Antcliff v. June*, 81 Mich. 477, 490, said: "A plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called."

What the plaintiff calls his action does not determine the nature or class to which it belongs, but the cause of action stated in the body of the declaration. *Wood v. Railroad Co.*, 81 Mich. 358, 363.

If the plaintiff relies upon false representations as a ground of recovery, it is enough to allege and prove the substance and material parts of the representations sufficient to maintain the action. *Shelton v. Healy*, 74 Conn. 265.

Defenses must not be anticipated. Allegations of matters more properly of defense will be treated as surplusage. *Scottish National Ins. Co. of America v. Adams*, 122 Ill. App. 471. And see *supra*, DEPARTURE.

But on demurrer all irrelevant and redundant matter will be disregarded, the question being whether the complaint states facts which constitute a cause of action. *Budd v. Howard Thomas Co.*, 40 Misc. 52.

And a defective and faulty statement of a cause of action is waived

prove no material fact, which the declaration does not allege. (h)

by the defendant if he denies and goes to trial. *McNerney v. Barnes*, 77 Conn. 155.

Reference.—It has been pointed out heretofore that in a pleading there may be a reference from one paragraph to a preceding paragraph. But material facts of a cause of action cannot be thus supplied. This does not require a repetition of exhibits or introductory matter. *Murray v. City of Butte*, 35 Mont. 161. But see, *Anniston Elec. & Gas Co. v. Elwell*, 144 Ala. 317; *Marietta v. C. C. & St. L. R. Co.*, 52 Misc. 16.

Code Provisions.—By section 481 of the New York Code of Civil Procedure the complaint must contain :

1. The title of the action, specifying the name of the court in

(h) [The relief must be consistent with the case made by the complaint, though it need not be that prayed for. *Bradley v. Aldrich*, 40 N. Y. 504. And see, *Ross v. Pence*, 17 Col. 24; *McNutt v. McNutt*, 116 Ind. 545; *Bergman v. Salmon*, 79 Hun 456; *Patrick v. Richmond & D. R. Co.*, 93 N. C. 422; *Hagar v. Townsend*, 67 Fed. 433; and last preceding note.

The plaintiff, if he sets out one cause of action, cannot prove and get judgment upon another. *Trout Brook Ice & Feed Co. v. Hartford Electric Light Co.*, 77 Conn. 338. "The facts proven must be legally identical with the complaint put forth; and this for the defendant's protection, first, that he may know the charge which he is to meet; secondly, if he is unable to disprove it, that the verdict and judgment may protect him from another action based upon the same wrong." *Shepard v. New Haven & Northampton Co.*, 45 Conn. 54. And see *supra*, THEORY OF ACTION.

For example, an action asking for the specific performance of a contract is purely equitable. If, then, upon the evidence the plaintiff is entitled to legal relief only the action cannot be sustained. The plaintiff must bring his case within his allegations as well as within the proofs. "The clear distinction between equitable and legal causes of action, and the remedies appropriate to them, still exists, and a recovery must be had *secundum allegata et probata*." *Bowen v. Webster*, 3 App. Div. 86, 89, citing *Stevens v. Mayor, etc.*, 84 N. Y. 296; *Phelps v. Mayor, etc.*, 25 Abb. N. C. 156.

An immaterial variance, however, will be wholly disregarded. *McNerney v. Barnes*, 77 Conn. 155. For example, if the plaintiff make a defective statement of a good title to relief rather than a statement of a defective title, and the defendant is not prejudiced, there is no material variance. *Osborn v. Norwalk*, 77 Conn. 663.]

THE DECLARATION MUST SHOW TITLE.—The first and most comprehensive rule, in respect to the requisites of a

which it is brought; if it is brought in the Supreme Court, the name of the county, which the plaintiff designates as the place of trial; to the relief for which he asks : he is entitled to relief on the facts and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts, constituting the cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

The Prayer for Judgment.—A demurrer will not lie to a complaint which shows that the plaintiff is entitled to some relief, though not stated. *Wetmore v. Parker*, 92 N. Y. 76; *Williams v. Connors*, 53 App. Div. 599; *Connor v. Ashley*, 49 S. C. 478.

The prayer for relief becomes important where the defendant demurs instead of answering, for then, under Code provision (N. Y. C. C. P., § 1207), the judgment cannot be more favorable to the plaintiff than he demands. So when equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer is interposed : *Kelly v. Downing*, 42 N. Y. 71. And the converse is true. *Cody v. First Nat. Bk.*, 63 App. Div. 199; *Black v. Vanderbilt*, 70 App. Div. 16.

If one sues another acting in a representative capacity he cannot have a personal judgment against the defendant where he has not prayed for it, nor set up facts entitling him to it. *Kervan v. Hellman*, 110 App. Div. 655.

Place of Trial.—The county named in the complaint determines the place of trial when there is a variance between the summons and complaint. *Goldstein v. Marx*, 73 App. Div. 545. A mistake in this regard may be corrected, however, where it was inadvertently made, if the plaintiff acts before the defendant has gone on in reliance on the later statement. *Tolhurst v. Howard*, 94 App. Div. 439.

The action is "commenced" in the county so named, and not where service is had. *Benson v. East. Bldg. & L. Asso.*, 67 App. Div. 319.

A provision in a contract may govern the place of trial. *Id.*; and see *VENUE*, *supra*.

The Counterclaim secures to the defendant full relief, which a separate action at law or a bill in chancery, or a cross bill could have secured to him on an allegation of the same facts, but relates to only such causes of action as exist against the plaintiff. *Gleason v. Moen*, 2 Duer. 639; *Kollock v. Scribner*, 98 Wis. 104.]

declaration, is that it must show a *title* (i. e. a *right of action*), in the plaintiff. (i) If then the declaration, which is the *foundation* of the suit, is insufficient in law to warrant a judgment in the plaintiff's favor; no *subsequent* allegation on his part can entitle him to a recovery. (j) He must recover upon the grounds, on which he *first* places his claim, or not at all.

If, therefore the declaration, though otherwise sufficient, discloses any fact, which shows that at the *commencement* of the suit (k) the plaintiff had no right of action; he cannot have judgment (l): as where in debt on an obligation, it appeared from the declaration, that the writ bore date *before* the time of payment appointed in the deed. For the

(i) Com. Dig. *Pleader*, C. 34; Bac. Abr. *Pleas*, &c., B. 1.

(j) Bac. Abr. *Pleas*, &c., B. 1.

[The Code provision that where there is an answer the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue, does not aid a plaintiff who has insufficiently stated the cause of action upon which he seeks judgment. It was intended to aid him if his complaint is adequate for the judgment he asks, except his prayer for relief. *Kelly v. Downing*, 42 N. Y. 71, 78.]

(k) The suit is considered as *commenced*, from the issuing of the writ (3 Black. Com. 273, 285; 7 T. R. 4; 1 Wils. 147): but where the *teste*, or date of the writ, is *fictionis*, the true time of its issuing may be averred and proved, whenever the purposes of justice require it: as, to let in a plea of *tender*, or of the statute of *limitations*. (Bac. Abr. *Tender* D.; 1 Stra. 638; 1 Wils. 147; Peake Ev. 259.) In the usual practice of the Court of King's Bench, however, the suit is not deemed to be commenced till the filing of the *bill*, (or declaration) which is considered in that court as the *original*. (Cowp. 454, 456; 1 Wils. 147; 2 Burr. 960; 8 Mod. 343; 1 Vent. 28.) See *supra*, ORIGINAL WRIT.

The *service* of the summons is the commencement of the suit in New York. [N. Y. C. C. P., § 416. And in *Boyd v. United States Mortgage & Trust Co.*, 94 App. Div. 413, it was held that the suit dated from the service of the original summons, though the court permitted an amendment of the summons and complaint to correct a mistake in naming the defendant, the amended papers being served on the defendant.]

(l) Cowp. 454; Bac. Abr. *Pleas*, &c., B. 5; 7 Co. 24-5; Cro. Eliz. 325.

cause of action, which entitles a party to recover by suit, must be *complete* at the time when the suit is *commenced*. If it is not *then* complete, the complaint of the plaintiff must of necessity be either *untrue*, or *insufficient in law*.

For any matter, accruing *after* the commencement of the suit the plaintiff therefore cannot recover (*m*)—except that *interest*, on demands carrying interest, is recoverable up to the time of the *judgment*, under the name of *damages*. (*n*) For the interest is regarded as only incident to, or part of, *the debt*; and that interest, which accrues after the commencement of the suit, being inseparable from the rest, is consequently recoverable in no other way. (*o*)

THE GIST OF THE ACTION.—So also, if the declaration *omits* the averment of any fact, which is of the *gist* of the action—(as, if no *consideration* be alleged, in assumpsit (*p*) no conversion in trover, &c.); the omission is fatal. (*q*)

(*m*) 2 Saund. 171, c. (n. 1.); Cowp. 454.

(*n*) 2 Burr. 1085, 1087; 2 T. R. 58; Doug. 376; Chitt. on Bills, 214; Toller on Ex. 286-7; 2 Saund. 171, c. (n. 1.); *Beals v. Guernsey*, 8 Johns. 446.

(*o*) 1 Esp. Rep. 110; 2 New. Rep. 206, n.; *Tillotson v. Preston*, 3 Johns. 229; *Johnston v. Brannon*, 5 Ib. 271.

Where the plaintiff seeks to recover interest up to the time of judgment, the precise amount cannot be inserted. In order to avoid this difficulty, some pleaders have adopted the following form :

"The plaintiff claims \$ (the exact amount of the debt, and interest to the date of the writ) with interest on \$ (the exact amount of the debt only) at per cent. per annum, from the date of the writ herein until payment or judgment."

And so under the Codes.

(*p*) In assumpsit on bills of exchange and promissory notes, however, the mere statement of the facts, which create the defendant's *liability*, dispenses with the necessity of stating the consideration for which the bill, &c., was drawn, accepted, or indorsed. (2 Bos. & P. 79; 1 Chitt. Pl. 295.) For these instruments, like specialties, afford *prima facie* internal evidence of a consideration, and conse-

(*q*) Bac. Abr. *Pleas*, &c., B. 1; Doct. Pl. 85; 1 Sid. 184; Bull. N. P. 33; 2 Salk. 519, 640; 7 T. R. 348, 351, n.; 5 Ib. 143; Com. Dig. *Assumpsit*, H. 3; 6 East, 568; 8 Ib. 9; 2 Bos. & P. 79.

The gist of the action is that, without which there is *no cause* of action. It comprehends, therefore, whatever is *indispensable in law* to a right recovery.(*r*) Hence, if anything of this kind be omitted, no title can appear from the declaration; and the defect is of course incurable.(*s*)

Whenever therefore the right of recovery depends upon a *condition precedent*, the declaration must aver performance of it, (or what is equivalent to performance), to entitle the plaintiff to recover.(*t*) For in every such case, performance

quently dispense in general, with the proof of it. And what need not be *proved*, need not be alleged. (2 *Ld. Ray.* 758; 3 *Salk.* 70; 1 *Black. Rep.* 487; 2 *Black. Com.* 445; *Kyd on Bills* 48; 3 *Burr.* 1516, 1523; *Chitt. on Bills*, 9, 51, 201, 209.)

(*r*) *Bac. Abr. Pleas, &c.*, B. 1; *Doct. Pl.* 85; [*Tarbell v. Tarbell*, 60 *Vt.* 486, quoting the text.

The gist of an action is the essential ground or foundation of the action without which the action could not be maintained. Thus, if a parent sues to recover damages for an injury to his child, the gist of the action is the loss of the services of the child by the parent. *Frazier v. Georgia Railroad Co.*, 101 *Ga.* 70, and authorities cited. And see, *Hoffman v. Knight*, 127 *Ala.* 149. It is to this that the doctrine of *res adjudicata* applies. Judgment is conclusive upon the matter only which is directly in issue. Facts offered in evidence to establish a matter in issue are not themselves in issue within this rule. *Vaughan v. Morrison*, 55 *N. H.* 580; *King v. Chase*, 15 *N. H.* 9.

In the Code States.—Whatever facts were necessary before the Code to give a party a cause of action are still essential and material. *The same test applies.* *Denniston, Wood & Co. v. Merchants' Bk.*, 2 *Disn.* 52. That provision of the codes which requires that the complaint shall contain a plain and concise statement of the facts constituting the cause of action does not require a different or more complete statement than the declaration formerly required. See *N. Y. C. C. P.*, § 481. It was early declared in New York that the complaint should contain the substance of the declaration at common law. *Zabriskie v. Smith*, 13 *N. Y.* 322, 330; re-affirmed in *Goodman v. Alexander*, 165 *N. Y.* 289, 293].

(*s*) *Bac. Abr. Pleas, &c.*, B. 1; 3 *Black. Com.* 395; 4 *T. R.* 472; 2 *H. Black.* 201; *Doug.* 683.

(*t*) 7 *Co. 10*, a.; *Bac. Abr. Pleas, &c.*, B. 5, (2.); *Com. Dig. Pleader*, C. 51, 70-75; *Plowd.* 25, b.; *Yelv.* 134, n.; 1 *T. R.* 645; 7 *Ib.* 125; 1 *Saund.* 320; 2 *H. Black.* 574; [*Gummer v. Mairs*, 140 *Cal.* 535, 538;

of the condition, or what the law holds equivalent to it, is a constituent and indispensable part of *the right* of action—or that, without which there can be no cause of action.(u)

Thus, in an action against the indorser or drawer of a bill of exchange, if the declaration does not allege a *demand* of payment, at the proper time, on the drawee, or acceptor—or omits an allegation of due *notice* to the defendant, of the refusal of payment by the former; the omission is fatal.(v)

Nat. Contracting Co. v. Com., 183 Mass. 89, 94; *Root v. Childs*, 68 Minn. 142; *Flagg v. Fisk*, 93 App. Div. 169; *Ketchum v. Belding*, 58 App. Div. 295; *Fogg v. Sub. Rap. Trans. Co.*, 90 Hun 274. What is a condition precedent depends not upon technical words but upon the plain intention of the parties, to be deduced from the whole instrument. *Ketchum v. Belding*, 58 App. Div. 295; *Roberts v. Brett*, 11 H. L. Cas. 337; *Weeks v. O'Brien*, 141 N. Y. 199. And see, for examples, *Root v. Childs*, *supra*; *Fogg v. Sub. Rap. Trans. Co.*, *supra*].

(u) By the New York Code, a 'general allegation that the party has duly performed all the conditions, (precedent,) on his part, is sufficient. [Code § 533, *Rochester R. Co. v. Robinson*, 133 N. Y. 246; *Fox v. Cowperthwait*, 60 App. Div. 528; *Sager v. Gonnerman*, 50 Misc. 500, 505. The word "duly" is essential to a proper allegation under this section. *Clements v. Amer. Fire Ins. Co.*, 70 App. Div. 435; *Guarino v. Firemen's Ins. Co.*, 44 Misc. 218. The word "duly" is of substance, not merely a form. *Clemens v. Amer. Fire Ins. Co.*, 70 App. Div. 435.] Where the condition precedent is the *performance of a contract*; and *full performance* has been prevented by the *act of God*, or of the *law*; *full performance is excused*. And, in such a case it is *not* necessary for the plaintiff, (suing, to recover for what he has done under the contract,) to state in *his complaint*, the *excuse* for not fully performing. He may *reply the excuse*, if the defendant, in his answer, defend upon the ground of the non-performance. *Wolf v. Howes*, 20 N. Y. 197. [If in an action for breach of contract plaintiff alleges full performance he must prove as alleged: if he relies on excuse he must allege facts excusing him and allege readiness to perform. *Stern v. McKee*, 70 App. Div. 142. If the defendant has denied performance the plaintiff may show that the defendant prevented performance. *Smith v. Wetmore*, 167 N. Y. 234. And facts and circumstances constituting waiver, if relied upon, must be pleaded. *Todd v. Un. Cas. & Surety Co.*, 70 App. Div. 52.]

(v) Doug. 683; Chitt. on Bills, 132-3, 188-9, 202-3; 5 Burr. 2670; 1 T. R. 712.

For such demand and notice are implied *conditions*, the performance of which, by the holder, is essential to the liability of the indorser or drawer. (*w*)

And in all cases, in which actual *notice* of any fact to the deferdant, or a special *request*, is, either by the terms or the nature of the contract, the *condition* of his liability; such notice, in the one case, and such request, in the other, is of the *gist* of the action, and must therefore be specially averred in the declaration. (*x*) For without such averment, no complete right of action can appear from the declaration.

And whenever an *actual* request is necessary to be stated, the general averment, "although often thereunto requested," is not sufficient (*y*): that averment being but matter of form and not traversable.

It is never necessary, by the common law, for the plaintiff, in his declaration, to state, or in any manner to take notice of any condition *subsequent*, annexed to the right which he asserts. (*z*) For the office of such a condition is, not to *create* the right on which the plaintiff founds his demand; but to *qualify* or *defeat* it. The condition, therefore, if performed or complied with, furnishes matter of *defence*, which it is for the *defendant* to plead. Thus in debt on bond, it is not necessary for the plaintiff, in his declaration, to state or count upon any other than the *penal* part of the instrument; leaving the condition to be pleaded by the *defendant*, if it affords him any defence; as it does, if per-

(*w*) *Niles v. Lindsley*, 1 Duer 610; *Bristol v. Renselaer & S. R. Co.*, 9 Barb. 158.

(*x*) Com. Dig. *Pleader*, C. 69, 73; Sav. 72; 1 Saund. 33 (n. 2.); 2 Keb. 126; 1 Stra. 88; Hob. 68; Com. Dig. *Condition*, 10, 11; 14 East, 500; 16 Ib. 110; 1 Campb. 425; 5 T. R. 409.

(*y*) 1 Saund. 33 (n. 2.); 1 Stra. 88. If a special demand is not necessary to the maintenance of the action it need not be proved, although directly alleged. *Rich v. Jones*, 9 Cush. 329, 335.

(*z*) Com. Dig. *Pleader*, C. 57; 7 Co. 10, a. b.; 11, a.; Bac. Abr. *Pleas*, &c., B. 5, (2.); 1 T. R. 638; 1 H. Black. 254; 2 Ib. 574.

formed.(a) For the penal part of the bond, alone, constitutes *prima facie*, a right of action.

The plaintiff *may*, however, in an action on bond, count as well upon the conditon, as upon the penal part; but if he declares in this manner, he must allege the breach of the condition in his *declaration*, instead of *replying it*, (as he must, when he counts only on the penal part), in answer to the defendant's plea.(b) The declaration, when formed in the former manner, is called a *special* one.(c) It is a general rule, that in declaring upon a deed or other instrument, consisting of several distinct parts, the plaintiff is required to state only so much of the instrument, as constitutes, *prima facie*, a complete right of action.(d) And if any other part of the instrument furnishes the means of defeating the action; it is matter of *defence*, of which the defendant may, on his part, avail himself for that purpose.

But in declaring upon a covenant, or upon articles of agreement, an *exception*, (if there be any), in the *body* of the covenant, &c., must be set out, and the subject-matter of the exception must be excluded from the breach assigned.(e)

If then A. covenants to convey to B. a certain farm, *except* one particular close; B., in an action on the covenant must state the *exception*, as well as the rest of the covenanting clause; and in assigning the breach, must aver that A. has not conveyed the farm, *except* the one specified close. For the exception enters into the *description of the covenant*; and

(a) Id.; 2 Chitt. Pl. 151-3.

(b) Bac. Abr. *Pleas*, &c., B. 1; Doct. Pl. 84; 2 Chitt. Pl. 152-7.

(c) Under the rules for drawing a complaint, it should always be *special*, in this sense:—That is, it should state the *very thing*,—the *very fact*,—sued upon; as there is no opportunity for the plaintiff to *re-assign* in a *reply*;—there being no reply, unless in exceptional cases, or at the option of the defendant. This *option* being exclusively with the defense. [N. Y. C. C. P., §§ 514, 516.]

(d) 8 East, 7; 6 Ib. 567; 1 Chitt. Pl. 300-1, 352; Doug. 667; 1 Saund. 233. (n. 2.)

(e) T. Jon. 125; Esp. Dig. 300.

the corresponding exception in the assignment of the breach, is necessary to show that the breach is within the covenant. If the declaration should set out the covenant to convey the farm, without stating the exception; there would be a *variance*: and if the exception, though stated in the *description* of the covenant were omitted in the assignment of the *breach*: no breach, within the covenant, would appear in the declaration: since all the land, *not* embraced in the exception, might have been conveyed, consistently with the truth of such an assignment.

But if A. covenants to convey to B. a certain farm, with a *separate proviso*, that on A's. performing a certain act, he shall not be bound to convey one particular close, parcel of the farm; B. in declaring on the covenant need not take notice of the *proviso*.(f) For it does *not* enter into the description of the covenanting clause, on which the action is founded; but is in nature of a condition *subsequent*, of which A. may avail himself in his defence, if he has performed the act mentioned in the proviso.

A distinction, analagous to that above stated, prevails, in declaring on *statutes*. In an action founded on a penal statute, the subject of any exception, in the *enacting* or *prohibitory* clause of the act, must in the declaration be ex-

(f) T. Ray. 65; 1 Lev. 88; Esp. Dig. 300.

A *proviso* is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance; an *exception* is a taking out of the covenant some part of the subject-matter of it. If these be right definitions, the plaintiff need never state a proviso, but must always state an exception; and whether particular words form a proviso or an exception, will not in any way depend on the precise form in which they are introduced, or the part of a deed in which they are found. *Vavasour v. Ormrod*, 6 B. & C. 430; 9 D. & R. 597; *Gurly v. Gurly*, 8 Cl. & Fin. 784; *Minis v. United States*, 15 Peters, 445; 1 Wms. Notes to Saund. 279; *Kingsley v. New England Ins. Co.*, 8 Cush. 401; *Commonwealth v. Hart*, 11 Id. 134, 137.

If there be an *exception* contained in the covenant itself, and the declaration state the covenant as an absolute one without noticing

cluded by averment(*g*): but of any *proviso* or qualification, in a *separate substantive* clause, the declaration need not take notice.(*h*) In the first case, the exception is an essential part of the *description of the offence* or thing prohibited; in the latter, the proviso, &c., is only distinct matter of *defence*. Thus, if a statute enacts that if any person, *not having a certain qualification*, (as a freehold estate) shall kill certain game, he shall incur a certain penalty; the declaration, in an action on the statute, must aver that the defendant had *not* such a freehold. But if the act contains a separate *proviso*, that if he shall have obtained a *license* for the killing from a magistrate, he shall not be liable to a conviction; it need not be stated, that he had no such *license*.

THE DECLARATION MUST BE CERTAIN.—The declaration, like all other pleadings, must contain certainty.(*i*) This requisite, so far as regards *parties, time and place*, has already been considered. But the certainty required in stating the *subject-matter* or *matter in demand*, remains to be explained.

The subject-matter of a suit embraces all the *material facts*, which constitute the cause of action: and consequently

the exception, the variance is fatal on *non est factum*. *Tempany v. Burnand*, 4 Camp. 21.

(*g*) ["In stating a cause of action arising upon a statute, it is an ancient rule that where an exception is incorporated in the body of the [enacting] clause of a statute, he who pleads the clause ought to plead the exception. But where there is a clause for the benefit of the pleader and afterwards follows a proviso which is against him, he may plead the clause and leave it to his adversary to show the proviso." *Rowell v. Janvrin*, 151 N. Y. 60, 66, treating an amendment as being in the nature of a proviso].

(*h*) 1 Burr. 153; 1 T. R. 141; 6 Ib. 559; 7 Ib. 27; 8 Ib. 542; 1 East, 646; 2 McNall. Ev. 544. [*People v. Pendleton*, 79 Mich. 317; *Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104.] And see, *Com. v. Hart*, 11 Cush. 130; *U. S. v. Cook*, 17 Wall. 168; *Com. v. Jennings*, 121 Mass. 47.

(*i*) Bac. Abr. *Pleas*, &c., B. 1; Hob. 295; Co. Litt. 303, a.; *Com. Dig. Pleader*, C. 21; 5 Co. 35; *Com. v. Byrnes*, 126 Mass. 248.

comprehends, (according to the nature of the case), the *contract* declared upon and the breach of it—or the *wrong* complained of, and its injurious consequences—or the *property*, of which a recovery is sought, or in respect to which the alleged injury and damage have been done. But the requisite of certainty respects only the *manner* in which these particulars are to be stated. And in most cases, when the pleader understands what *facts* are necessary to be stated, there is very little difficulty in alleging them with the requisite *certainty*; which in general, consists merely in alleging them so *distinctly* and *explicitly*, as to exclude ambiguity, and make the meaning of the averments clearly intelligible.(j)

From the nature of this subject, it is impossible to point out, by any definite general rule or rules, the *precise* degree of certainty, which may be necessary, in all cases, in setting out the subject-matter; and hence very little on this point is found in the law, except what may be collected from particular examples.

(j) The student's *particular attention* is called to this rule, as the rule of pre-eminent use under the Code. [The codes do not dispense with reasonable certainty, and though uncertainty is usually taken advantage of by motion to make more certain—which is the substitute for the special demurrer—yet the same substantial certainty is required now as formerly (*McLean v. Lewiston*, 8 Idaho, 472; *Mallincrodt Chem. Wks. v. Nemerich*, 169 Mo. 388, where it was said that the defendant must be apprised of the grounds on which the plaintiff is proceeding; *Thill v. Hoyt*, 37 App. Div. 521; *Oates v. Gray*, 66 N. C. 442), and if the complaint is so uncertain that the court cannot tell on what theory a recovery is sought, it is demurrable. For example, where a plaintiff sued for damages for an injury received by a fall from a bicycle alleged to have been occasioned by a defect in a street, it was held not enough to describe the defect and to allege that while the plaintiff was riding in the street he was thrown and injured by reason thereof. The plaintiff should have alleged clearly how the defect was connected with the accident. *Logansport v. Kihm*, 159 Ind. 68. And see, *Pitts v. Smith*, 108 Ga. 37; *Grentner v. Fehrenschild*, 64 Kan. 76, 84.]

The only general rule of extensive application, in respect to this kind of certainty is, that the subject-matter of the action must be described in the declaration, with *convenient* certainty; and that no greater certainty is required, than the subject will *conveniently* admit of.^(k) Or in other words, that if the averments are so made, that the adverse party, the counsel, the jury, and the judges, can fully *understand* the subject-matter; the declaration is sufficiently certain.^(l) In the application of this rule to individual cases, the court is necessarily left, in some degree, to the exercise of its *discretion*; but a more definite general rule could not perhaps be framed.

In actions *ex contractu*, the declaration must distinctly state the nature and essential parts of the contract, either in the terms of it—or in substance, and according to *its legal effect*—together with the breach.^(m) And except in the case of contracts *under seal*, and negotiable instruments, the *consideration* must also be stated; as the contract will otherwise appear from the declaration to be *nudum pactum*.⁽ⁿ⁾ Hence in an action on a deed, a description of it, as “a *certain* bond,” without further particulars, is not sufficient^(o); since such a description would not *identify* the bond sued upon.

So in assumpsit for wages, alleged to be due in consideration of the plaintiff's performing “a *certain* voyage,” without describing it, the statement of the consideration is too uncertain.^(p)—and a justification, alleged to be ‘by virtue

(k) Bac. Abr. *Pleas*, &c., B. 5, (5.); 1 Stra. 637; Ld. Ray. 588, 1410.

(l) Lawes' Pl. 53; 2 Bos. & P. 267; Co. Litt. 303, a.; Com. Dig. *Pleader*, C. 17.

(m) 1 Saund. 233, (n. 2.); 2 Ib. 305, (n. 13), 366; Doug. 669; 1 T. R. 240; 4 Ib. 560; 5 Ib. 498; 1 Chitt. Pl. 299, 351.

(n) 6 East, 567; 8 Ib. 7.

(o) 1 Bos. & P. 100, 102; 1 Chitt. Pl. 240.

(p) 2 Bos. & P. 116; and *vide* Ib. 265; 13 East, 102.

of a *certain* writ,' without setting it out, would be ill for want of certainty.(q)

And the words "duly," "lawfully," &c., without a statement of the *special facts* of which they are predicated, have, in general, no effect.(r) For such terms are not only indefinite; but affirm matter of *law*, instead of *fact*, and consequently are not *traversable*.(s)

In ejectment, the town, city, parish, &c. and the county in which the land lies, must be stated in the description of the land.(t) In some of the United States, the boundaries or abuttals are also a usual part of the description. Great precision was indeed formerly required, in describing the land, in ejectment; but the rule is much relaxed in the modern practice. Such precision is now held unnecessary—especially, as according to the present doctrine, the lessor of the plaintiff must, at his peril, *show* the land to the sheriff, on the execution.(u)

In trespass *quare clausum fregit* also, the close must be described, as lying in a certain parish and county named; and it is held advisable to set out also the abuttals, or *name* of the close.(v) In the United States, in which closes, or parcels of land, are not in general known by particular

(q) 1 Saund. 298, n. 1; 1 Chitt. Pl. 227, 240.

(r) 9 Co. 25, a.; *Braun v. Sauerwein*, 10 Wall, 218, 223. [See *supra*, Conclusions of Law.]

(s) In New York, under the Code, "*duly*" appointed has been held sufficient, when used as to a matter, which was met by a *dilatory* plea; as, "A. an infant, &c., by B. *duly appointed* his guardian, &c.," was held good, on *demurrer* as sufficiently stating an appointment by a judge, or by the court, there being "*duly*," *no other* appointing power. (*Sed, vide Hulbert v. Young*, 13 How. Pr. 413.) *Quare?* Would not the better holding have been *otherwise*, as tending to better pleading? (See *supra*, CONSTRUCTION, and CONCLUSIONS.) See, however, (*accord*.) *Sere v. Coit*, 5 Abbott, 482; Van Santvoord's Equity Practice 88.

(t) Cro. Eliz. 465; 3 Lev. 334; 5 Burr. 2673; 2 Chitt. Pl. 394, 400.

(u) Stra. 71, 1063; 1 Burr. 629; Cowp. 350.

(v) 2 Black. R. 1089; 2 Chitt. Pl. 382-8; Bull. N. P. 89.

ancient *names*, a description by *abuttals*, or by lines and distances, would seem generally indispensable. And any mistake, in a description by *abuttals*, is fatal; although the parish and county be truly laid. (*w*) For the *abuttals*, when given, are a *local description of the injury* complained of.

In some cases, where the facts, which constitute the alleged cause of action, are supposed to lie in the knowledge of the *defendant*, but not of the plaintiff, less particularity of statement is required in the declaration, than would otherwise be necessary. (*x*) Thus, in an action by a lessor against an *assignee* of the term, it is sufficient, as regards the defendant's interest, to aver in general terms that the estate of the lessee came to him "by assignment": for the plaintiff is not supposed to *know all* the particulars of the defendant's derivative title. Whereas, in action *by* the assignee against the lessor, the declaration must state specially *all* the mesne assignments, down to himself: for the assignee, being privy to them, is presumed to be *able* to state them specifically; and therefore is not allowed to allege his title *generally*. (*y*)

Most of the questions, which have arisen in regard to certainty in stating the subject-matter have related to the description of *personal chattels*, in actions for injuries to that species of property. In these, however, as in other cases, the rule before stated now generally prevails: viz. that the property must be described with as much certainty, as it will *conveniently* admit of; and that no greater certainty than this is necessary. (*z*)

In the action of *detinue*, indeed, *great minuteness* of de-

(*w*) 1 T. R. 479; 2 Chitt. Pl. 387, note (n.); *Sawyer v. Ryan*, 13 Met. 144.

(*x*) 3 T. R. 767; 8 East, 85; Com. Dig. *Pleader*, C. 26, 42; [*Griswold v. Nat. Ins. Co.*, 3 Cow. 96; *Hammer v. Kaufman*, 2 Bond 1].

(*y*) 1 Saund. 112, n.; 1 Chitt. Pl. 353; 2 Ib., 196-7; 6 Mod. 72; Vide Bac. Abr. *Pleas*, &c., 1, 3.

(*z*) 1 Vent. 114, 317; 1 Ld. Ray. 588; 2 Stra. 809; 1 Lev. 301; 2 Ib. 176; Bac. Abr. *Pleas*, &c., B. 5. (5.)

scription has been considered necessary; because the goods are to be specifically restored to the plaintiff, on the execution. (a) It appears, indeed, to have been deemed necessary to describe the goods so minutely that the sheriff might be able to identify them, by the *mere description* given of them in the writ of execution. And when the action of detinue was first superseded by that of *trover*, as great precision and minuteness of description were deemed necessary in the latter, as in the former action. (b)

But it is now established, that in *trover*, trespass, and other actions in general, for injuries to personal chattels, nothing more than *convenient* certainty is necessary in the description of them. (c) In these actions then, it is necessary to describe the goods, by specifying distinctly their *kind* or *kinds*, together with their *quantity, number, weight* or *measure* (d); and this is regularly all that is required for the purpose of certainty, in describing them. But number, quantity, &c., alleged in the declaration, does not regularly require strict proof, and need not therefore be *truly* stated, except when alleged in the recital or statement of a *record, written instrument, or express contract*. (e) For except in these cases, the statement of a wrong number, &c., does not occasion a *variance*. And in the cases now under consideration, (*trover, trespass, &c.*), if the plaintiff proves the wrongful taking away, or conversion, of *any part* of the goods duly described in the declaration, he is entitled to recover *pro tanto*.

(a) 10 Co. 57; 2 Saund. 74, b. (n. 1.); Willes, 120; 3 Black. Com. 152; 2 Salk. 654.

(b) 2 Saund. 74, a. (n. 1.); Cro. Eliz. 865; 5 Co. 34, b.

(c) 2 Saund. 74, a. (n. 1.); 2 Stra. 809; Bull. N. P. 37; Esp. Dig. 588; Ld. Ray. 588, 1219; *Osgood v. Breed*, 12 Mass. 505.

(d) 5 Co. 34, b.; Bac. Abr. *Trespass*, I, 2. (1).

(e) Lawes' Pl. 48-9; 4 T. R. 314; Cro. Car. 262; 2 Black. Rep. 1104; Doug. 669. [Under the codes the absence of merely formal allegations, which would require no proof, is not ground for demurrer. *Dias v. Short*, 16 How. Pr. 322].

And when the subject to be described is supposed to comprehend a *multiplicity* of particulars, a *general* description is sufficient; not only because the plaintiff may probably be *incapable* of describing them specifically; but also because a detailed description of them, if practicable, would produce great and inconvenient *prolixity* in the pleadings. Hence, where a declaration in trover alleged the conversion of "a library of books," without naming their number, titles or quality, the description was held sufficiently certain.(f)

And in an action for the loss of goods, by the burning of the plaintiff's house, the goods may be described by the simple denomination of "goods," without any designation of their quantity or kind (g); and it seems that in such a case, the words "divers goods" would be sufficient.

In actions for injuries to property, whether consisting of personal chattels, or chattels annexed to the reality (as growing crops, &c.), the *value* of the property, or at least *some* value must be alleged.(h) This is required, not strictly as matter of *description*, to identify the property: but because it is incumbent on a plaintiff claiming damages, to show in his declaration the *amount* of the damages which, according to his own statement of the case, he has sustained; and to this end, he is required to allege the *value*, or what he claims to be the value, of the property converted, destroyed or otherwise injured; and thus to furnish (according to his own showing), a *prima facie* rule of damages. But as he is not obliged to state the *true* value; the rule requiring it to be stated would seem to be of no great practical use.

In actions for *forcible* injuries—as assault and battery, false imprisonment, and other trespasses—the declaration

(f) 3 Bulstr. 31; Carth. 110; 2 Burr. 772; 8 T. R. 459; 1 Bos. & P. 640; Bac. Abr. *Trover*, F. 1; Sty. 25; Gilb. H. C. P. 122.

(g) 1 Keb. 825; Plowd. 85, 118, 123; Cro. Ellz. 837; 1 H. Black. 284; 3 Bulstr. 31; Finch's Law, 48.

(h) Bac. Abr. *Trespas*, I, 2. (1.); *Trover*, F. 1; 2 Lev. 230; Cro. Jac. 147-8; 1 Sid. 39.—*Cont. Esp. Dig.* 588; *Dub. Cro. Jac.* 130.

must allege the wrongful act to have been committed "with force and arms," and "against the peace."⁽ⁱ⁾ And by the common law, the omission of these words was an incurable defect.^(j)

According to some opinions, however, the words "*vi et armis*," though confessedly necessary in all cases of trespass, were even by the *common law*, only matter of *form*.^(k) But the better opinion appears to be, that they were necessary in *substance*.^(l)

(i) Bac. Abr. *Tresp.*, I, 1; 2 Salk. 636, 640; 1 Saund. 81, 82, (n. 1.), 140, (n. 4.); F. N. B. 196; Com. Dig. *Pleader*, 3 M. 7.

(j) Id. For every defendant, on conviction, in a civil action, of a forcible wrong alleged to have been committed *vi et armis*, &c., was obliged to pay a *fine* to the king, for the *breach of peace* implied in the act; and was subjected to the judgment of *capiatur pro fine*, under which he was liable to be arrested and imprisoned, until the fine was paid. But if the words expressive of the force were omitted in the declaration, the judgment of *capiatur* could not be rendered; and consequently, payment of the fine could not be enforced: so that if the omission of the words in question had not been held incurable, even by verdict, the crown would, by such omission, have been defrauded of the fine; and the *judgment*, which the wrong required, would have been changed into another species of judgment, (a *miserecordia*) not adapted to the action. 3 Black. Com. 398, App. 12; Hob. 180. And though by the statute 5 W. & M., c. 12, the judgment of *capiatur pro fine*, in civil actions, was abolished; yet as that statute prescribed a *substitute* for the fine, in all actions for forcible injuries (viz., the payment of a fixed sum by the plaintiff on signing judgment—which sum he recovers back by the judgment): and as it seems that this substitute cannot be exacted, unless the wrong is laid *vi et armis*, &c., the better authority appears to be, that these words were as necessary to give effect to the provisions of the statute as they were, for a different reason, (*i. e.*, to warrant a judgment of *capiatur*) by the common law. Bac. Abr. *Tresp.*, I, 1; 1 Saund. 82, (n. 1.); Com. Dig. *Pleader*, 3 M. 7. *Cont.* 2 Ld. Ray. 985.

(k) That is, before the statute 4 Ann., c. 16. Cro. Jac. 130; 2 Salk. 636, 640; Carth. 66.

(l) Bac. Abr. *Tresp.*, I, 1; 1 Saund. 82. (n. 1.)

But the omission of those words, and also of the words "*contra pacem*," may, after *verdict*, be supplied by amendment, under the statute 16 & 17 Car. 2, c. 8, § 1. And by statute 4 & 5 Ann. c. 16,

In declaring upon a contract or conveyance of any kind, to the validity of which a *deed* is, by common law, necessary (as a grant, covenant, &c.), the plaintiff must *count upon* the deed; i. e. he must allege the contract, &c., to be by *deed*, or under *seal*: otherwise the declaration will be insufficient. (m) This is necessary, on the general principle heretofore stated, that the declaration must allege *all* that is essential to a right of action. For, as the contract, &c., in the case now supposed, cannot take effect in law, except by deed; a declaration, not alleging it to be by deed, will show no right of action.

In all cases falling within this last rule, it must appear in the declaration, in some form, that the contract, &c., is under *seal*. (n) But certain terms of technical import—such as “indenture,” “deed,” or “writing obligatory”—supersede the necessity of an express averment that the contract, &c., is under *seal* (o): because each of these words, *ex vi termini*, imports a sealed instrument. It is therefore a sufficient compliance with the rule, to aver that the defendant, by his “certain deed,” or “certain writing obligatory,” covenated, granted, &c. But describing the instrument merely as a “certain writing” is not sufficient; as such a description does not legally designate a deed (p): no other than a *sealed* instrument being a deed.

But where an action is founded upon a contract or conveyance, which at common law is valid, *without* deed or the omission of the words *vi et armis* and *contra pacem* is expressly aided, except on *special demurrer*.

Bac. Abr. *Amendment*, &c., B.; Ib. *Tresp.*, I, 1.

(m) 2 Wils. 376; 6 Co. 38, 43, b.; 2 Salk. 519; Cro. Eliz. 571; 2 Stra. 814; Esp. Dig. 298; 1 Saund. 276, (n. 1); 1 N. Rep. 104; 1 M. & S. 573.

(n) Id.

(o) 1 Saund. 291, (n. 1.); 320, (n. 3.); 4 Leon. 175; Cro. Eliz. 737; Cro. Jac. 420; 1 Stra. 512; 6 Mod. 306; 1 Vent. 70.

(p) Cro. Eliz. 571; 1 Saund. 291, (n. 1.); 3 Lev. 234; 2 Ld. Ray. 1537-8; Com. Dig. *Pleader*, 2 W. 9, 14.

writing, but which the statute-law requires to be *written*, (as on any of the contracts embraced by the statute of *frauds and perjuries*), the declaration need not *count upon*, or take notice of the writing. (*q*) Thus if an action is brought on a promise by one person to pay the debt of another—or upon a promise by an executor or administrator, to pay a debt due from his testator or intestate; the declaration need not aver that the promise, or any note or memorandum of it, is *in writing*, even if such be the fact. (*r*) For the statute of *frauds* (which in each of these cases requires the promise to be written), though it introduces a new rule of *evidence*, does not alter or affect the manner of *pleading* (*s*): and as the promises were, before the statute, valid without writing, and, might therefore have been well declared upon at common law, without counting upon any writing; the same mode of declaring upon them is still good. It is sufficient in these cases, therefore, to show the writing in *evidence*. It may be added, that in this class of cases, the writing required by the statute is not regarded as an *instrument creating* the right asserted in the declaration; but as mere *evidence* of a parol contract. (*t*) This rule extends to declarations upon *all* the several kinds of promises and agreements contemplated by the above statute. (*u*)

On the same principle, a *lease* or an *assignment* of a lease, or a conveyance with *livery of seisin*, in fee, in tail, or for life, may be pleaded without the allegation of any *deed* or writing, even if the conveyance, &c., were actually made by

(*q*) Bull. N. P. 279; 2 Salk. 519; 1 Saund. 9, a. (n. 1.), 276, (n. 1.); 11 Price, 504; 3 Burr. 1890; 2 Show. 88; 12 Mod. 540; Bac. Abr. Statute, L. 3; *Agreement*, C.; *Miller v. Drake*, 1 Caines, 45; *Elting v. Vanderlyn*, 4 Johns. 237; *Cleaves v. Foss* 4 Greenleaf, 1.

(*r*) Id.

(*s*) 1 Saund. 9, a. (n. 1.), 211, (n. 2.), 276, (n. 1.); 3 T. R. 156; 2 Salk. 519; *Price v. Weaver*, 13 Gray, 272.

(*t*) 7 T. R. 350-1, n.; Cowp. 289.

(*u*) Id.

deed, &c.(v): because by the *common* law, no writing of any kind is necessary to such conveyance, &c.(w); and consequently no writing need be alleged, in *pleading* it.

And if, to a declaration upon any promise or agreement within the statute of *frauds*, the defendant *demurs*; he by demurring confesses the promise, as being *in writing*,—however the fact may be.(x) For as the demurrer, by confessing the promise, precludes *all proof* of it—so that the plaintiff cannot exhibit a written agreement in evidence, if he has one; the law must intend that the promise, thus confessed, is one which the plaintiff has the means of proving by *legal evidence*—i. e. that it is in writing. If it were otherwise, the plaintiff, though possessed of written evidence of the promise, would lose the whole benefit of it by the defendant's demurring.

But if any agreement within the statute of *frauds* is pleaded *in bar* of an action; the plea, it is held, must show that the agreement, or some note or memorandum of it, is in writing.(y) Thus if in *assumpsit*, by A. against B., the defendant pleads that the plaintiff has accepted, in satisfaction of his demand, an agreement by C. to pay the debt; the plea must show that C.'s agreement is in writing. For the plea *confesses* a cause of action, or legal claim once existing in favor of the plaintiff; and this can not be barred or destroyed, it is said, by any substituted claim, which it is not itself shown to be such as will *support an action*.

(v) Co. Litt. 121, b., 9, a. (n. 1.); 1 Saund. 276, (n. 1.)

(w) If, however, the action is *founded immediately upon any stipulation* in the deed, (as upon a covenant in it,) the deed must be pleaded, by the rule of the common law. For the deed itself necessarily enters into *the description* of any covenant, &c., contained in it. (1 Saund. 276, n. 1; Cro. Eliz. 571; 1 Lev. 88.) Besides, a covenant cannot exist, except by deed.

(x) Cowp. 289; 7 T. R. 350-1, n.

(y) T. Ray. 450; T. Jon. 158; Bull. N. P. 279; 1 Saund. 276, a. (n. 2.); 2 Wils. 49; Roberts on St. of Frauds, 203, *note*. Vide 2 Salk. 519, Evans' *note*; Lawes' Pl. in Assump. 90.

When a contract or conveyance, *unknown* to the common law, but authorized by statute and by the statute required to be in writing, is to be stated in any stage of the pleadings, it must be alleged to be *in writing*.^(z) Thus where a party declares upon, or otherwise pleads a *devise* of real property, he must aver that the devise was made *in writing*. This is necessary, upon the same general principle before mentioned, that the pleader must allege *all* that is essential in law to the right which he asserts in pleading. For a devise of reality, being unknown to the *common law*; no form of pleading it could, by the ancient common law, be prescribed. And as the statute of *Wills*, (32 Hen. 8. c. 1), which first authorized such devises, required them to be *in writing*; no right, under a devise not in writing, could ever have existed in the law: and therefore no devise could ever have been well pleaded, without an averment that it was *in writing*: since all that is necessary to its validity, or legal existence, could not otherwise have appeared from the pleading.

And the same reasons, which require a devise to be pleaded as being in writing, render it equally necessary to allege an observance of *all the other requisites*, prescribed by statute as essential to its validity: these requisites being expressly made as indispensable to the validity of such instruments, as writing itself. And hence, he who now pleads a devise, must aver not only that it is *in writing*, as provided by the statute of *Wills* (32 Hen. 8); but also that it is *signed and attested*, according to the provisions of the statute of *frauds* (29 Car. 2, c. 3, § 5.) For this latter enactment, relating to the same subject-matter as that of the statute of *Wills*, and being in effect only *supplementary* to it, is to be taken notice of in pleading, as if it formed a *part* of the elder statute.^(a)

^(z) Plowd. 376; 12 Mod. 540; 2 Salk. 519; Bac. Abr. *Statute*, L. 3; 1 Saund. 276, a. (n. 2.)

^(a) Bac. Abr. *Statute*, L. 3; Syst. Pl. 439; 2 Chitt. Pl. 231. *Vide* 6 Taunt. 628.

DECLARATION MAY BE GOOD IN PART AND BAD IN PART.—

A declaration, though consisting of a single count, may be good as to *part* of what the plaintiff demands, and ill for the residue: in which case, if the whole be demurred to, the plaintiff may have judgment for the part which is good. (b) Thus, if in covenant broken, the declaration assigns two breaches, one of which is well assigned, and the other ill—or if in trover for two chattels, one of them is sufficiently described, and the other not so; the plaintiff may, in either case, have judgment for that which is well pleaded. (c) For in these, and all similar cases, that part of the declaration, which is sufficient, shows of itself a complete right of action, which cannot be destroyed by the part which is worthless.

A DECLARATION MAY BE GENERAL OR SPECIAL. (d)—

Thus in debt on bond, a declaration, counting on the penal part only, is *general*: but if it sets out both the penalty and the condition, and assigns the breach, it is *special*. In assumpsit also, if the declaration states only a *general* legal liability and a general promise to pay, in the form of a common count; it is *general*: if it alleges a *special* express agreement, and a *specific* consideration, according to the usual forms of declaiming upon express promises, it is *special*—And a declaration may contain both special and general counts.

(b) Bac. Abr. *Pleas*, &c., B. 6; 1 Saund. 286, (n. 9.); 2 Ib. 380, (n. 14.); Cro. Jac. 557; Com. Dig. *Pleader*, C 32; Lawes' Pl. 59, 60; 1 Salk. 218; 11 East, 565; 3 Caines, 89.

It is assumed in this rule, that the demand in the declaration is *divisible* into two or more distinct claims, of which one alone constitutes a right of action—as in the examples which follow in the text. For if a declaration founded on one *individual* demand, (as on a *single* promise, or a *single* breach of covenant, or the conversion of a *single* chattel), is ill in part, it is necessarily so *in toto*.

(c) Id.; 6 Johns. 65.

(d) Bac. Abr. *Pleas*, &c., B. 1; Doct. Pl. 84.

DECLARATION MUST AGREE WITH WRIT. 379

THE DECLARATION MUST AGREE WITH, OR PURSUE, THE COMPLAINT MADE IN THE WRIT.(e)—For the writ is the foundation of all the subsequent proceedings, and indeed confers upon the court all its *authority* to proceed, in each particular action. Besides, the declaration is, or ought to be, merely an enlarged *exposition* of the writ; and must of course follow up the same complaint, as is contained in the writ. If, therefore, the declaration varies from the writ—as if the writ sounds in *tort*, and the declaration in *contract*, or *e converso*—the latter is an abandonment of the complaint in the writ: and the court has, strictly, no authority to proceed in the suit. In such a case, the declaration itself is said to “abate the writ.”(f)

(e) Bac. Abr. *Pleas*, &c., B. 4; Doct. Pl. 84; Hob. 180.

[Prior to the year 1654 the declaration commenced by reciting the writ, and a variance being clear on the face of the declaration could be taken advantage of by demurrer. From that year to 1779 the writ was placed on the record by cravingoyer of it. This proceeding being used for delay the practice of moving to set aside proceedings for irregularity was adopted. *Bank of N. B. v. Arrowsmith*, 9 N. J. L. 353, citing *Boote v. Edwards*, Doug. 227; *Rust v. Frothingham*, 1 Gilm. 331; *Longyear v. Minnesota Lumber Co.*, 108 Mich. 645. By section 721 of N. Y. C. C. P., a variance between summons and complaint is cured by verdict].

(f) Bac. Abr. *Pleas*, &c., B. 4; *Abatement*, I.

Under the New York Code, where the summons was for *so much money*;—(i. e., it said that, in default of an answer, the plaintiff would take judgment for \$1,000) and the defendant appeared to the summons, by attorney; and a complaint for *assault and battery* was served on the attorney, claiming \$1,000 *damages*: It was, on motion, ordered that the complaint be *struck out*;—the summons being on *contract* (Code, § 129, division 1.)—and the complaint in *tort* (Code, § 129, division 2). See *Ridder v. Whitlock*, 12 How. Pr. 208; *Boington v. Lapham*, 14 Ib. 360; *Tuttle v. Smith*, *id.* 395; *Shafer v. Humphrey*, 15 Ib. 564.

Under this section, where there is a covenant to do a *specific act*, (as to till a farm in a proper manner;) and a suit is brought for *breach of the covenant*;—the form of summons required is one “*for relief*,” &c.; it being for *unliquidated damages*, although upon *contract*. (*Cobb v. Dunkin*, 19 How. Pr. 164.) So that such a cause

CHAPTER II.

JOINDER OF PARTIES.

Under this head, it may be premised, that the *remedy* or redress, which the law affords in any given case, for the violation or deprivation of a legal right, belongs exclusively to him or them, *whose* right has been violated, or is withheld. If then, the right of action is in *one* person only, another may not be joined with him, as plaintiff in the action. (a) For he whose sole right is violated, cannot by joining another person in his complaint, make the defendant liable to a *stranger*. This rule extends both to actions *ex contractu*, and *ex delicto*.

When the *several* rights of two or more persons are violated, even by one and the same act or wrong,—(as if the same slanderous words are spoken, by one and the same person, at the same time and place, and in the same sentence, of A. and B.; or if the persons of A. and B. are both injured, or their *several* interests violated, by one and the same tortious act)—they cannot regularly, in either case, *join* in an action for the injuries thus occasioned. (b) For there is no *joint* right

of action could *not be joined* with one for *rent*, due on the same lease which contained the covenant; as the latter, (the rent,) would require a *different summons*,—one for a *specific sum of money*.—In all cases, the *summons governs the complaint*, and gives to the action its *character*. *Shafer v. Humphrey*, 15 How. Pr. 564. *Ante*, THEORY OF ACTION.

(a) Com. Dig. *Abatement*, E. 15; Godb. 440; Hob. 72; Cro. Car. 300, 408, 575.

(b) Bac. Abr. *Pleas*, &c., B. 2; Gouldsb. 76; Kellw. 55, a.; Ow. 106; Cro. Car. 512; Bac. Abr. *Slander*, S. 1; Yelv. 129; Co. Litt. 145, b.; 2 Saund. 117 (n. 2).

violated.(c) On this principle, tenants *in common* cannot join, in a *real* action, or in *ejectment*, to recover the lands which they hold in common (d): their interests being not *joint*, but *several*.

(c) The Code (see §§ [446, 452] has made a decided difference in the right to join persons as plaintiffs. Different parties, owning *separate* tenements affected by a nuisance, may join as plaintiffs, in an action to restrain by injunction the continuance of the nuisance. *Peck v. Elder*, 3 Sandf. 126. So, tenants in common may join in ejectment. [And if one or more refuse to join, he or they may be made defendants. *Hasbrouck v. Bunce*, 62 N. Y. 475.] And, (by § [452] of the Code,) the court may order in, as parties, *all* persons "necessary to a complete determination of the controversy."—See *Judd v. Young*, 7 How. Pr. 79; *Tallman v. Hollister*, 9 Ib. 508; *Godfrey v. Townsend*, 8 Ib. 398; *Wallace v. Eaton*, 5 Ib. 99; *Davis v. Mayor of New York*, 24 Barb. 366; *State v. Mayor*, 2 Duer, 663; *Van Renselaer v. Bonesteel*, 3 Ib. 121.) "Having an interest in the subject of the action," is a reason for being joined as a party.

[And by § 723 the court may add or strike out the name of a party. As to the relation between these sections (452 and 723), see *Schun v. Brooklyn Heights R. R. Co.*, 82 App. Div. 560. Additional parties are to be brought in, under § 452, in equitable actions only. *Ten Eyck v. Keller*, 99 App. Div. 106; *Goldstein v. Shapiro*, 85 App. Div. 83. See *Long v. Burke*, 105 App. Div. 457. This latter section relates primarily to equitable actions, and gives the court no authority to compel the plaintiff in an action in which a money judgment alone is sought and in which the title to no real property or tangible personal property is involved, to bring in a defendant as a third party even on his application. *Horan v. Bruning*, 116 App. Div. 482.

With respect to the effect of section 723, there has been much contrariety of decision in the different Departments of the Appellate Division. The latest decision is *Gittleman v. Feltman*, 122 App. Div. 385, where it is held that under this section "additional defendants may be brought in on motion of the plaintiff in common law actions, whether in contract or in tort." Per Gaynor, J.

By the Connecticut Practice Act all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs. Non-joinder or misjoinder does not defeat the action; and the court may drop parties, add new parties, or substitute, as the interests of justice require. See *Morrison v. Richardson*, 53 Conn. 223, 235; *Loomis v. Hollister*, 75 Conn. 275; *Fairfield v. Southport Nat. Bk.*, 77 Conn. 423].

(d) 2 Black. Com. 194; Co. Litt. 197; 2 Wils. 232; 2 H. Black 387; 2 Black. Rep. 1077; Bac. Abr. *Joint Tenants*, &c., K.

If however slanderous words are spoken or written of *two partners* in trade, as such—i. e. if the slander or libel affect their joint interest as *traders*, and occasion *special damage*; they may join in an action for the injury. For the interest, and the injury sustained, are joint. And there appears to be no reason why the same rule should not hold, if the words were in themselves actionable, and *no special damage* alleged. For the damage, *implied or presumed* in the latter case, would be joint, in every sense in which *special damage* can be so. (c).

Where a cause of action accrues in right of a *feme covert*, if the right is such as would, on the husband's death, (he dying first), survive to her; they must both, regularly, join as co-plaintiffs in the action. (f) For she cannot sue alone, by reason of the legal disability of *femes covert* thus to sue; and if the husband alone could maintain the action, he might, in certain events, deprive her of her sole right of recovery after his own death. (g)

If the right of action is in *two* or more persons *jointly*, they all may and ought to join, as plaintiffs in the action, whether it be *ex contractu* or *ex delicto*. (h) For on the gen-

(c) 3 Bos. & P. 150; 3 Bing. 452; 2 East, 426; 2 Saund. 117, a. (n. 2.); 2 Selw. N. P. 1162; Yelv. 129, *note* by Metcalf. *Vide etiam*, 17 Mass. 182; and *Collins v. Barrett*, mentioned by Best, C. J., in 3 Bing. 456.

(f) 1 Roll. Ab. 347; 2 Wils. 424; 3 T. R. 631; 1 Bu. str. 21; Lane, 53-4; 1 Fonbl. Eq. 309; Bac. Abr. *Baron & Feme*, K.

(g) By the New York Code, (§ 450) a married woman can, *at law*, sue alone, or be joined with her husband, on the principles which *equity* held before the Code. *Brownson v. Gifford*, 8 How. Pr. 389; *Smith v. Kearney*, 9 Ib. 466. [So she may sue for the conversion of the property of another which was in her possession. *Lumley v. Torstello*, 69 App. Div. 76]. When the action concerns her separate property, she may sue alone. And so, in an action for divorce, she alone is named as the party against her husband. (See cases,—8 How. Pr. 456; 12 Barb. 9; 3 E. D. Smith, 310; 2 Duer, 633; 5 Ib. 476.)

(h) Com. Dig. *Abatement*, E. 8; *Pleader*, 2 V. 2; 1 Saund. 153,

eral principle, first premised, one person ought not to be allowed to sue alone, for the *whole* of that, of which he is entitled to only a part; and on the other hand, the defendant ought not to be subjected more than once, for one and the same cause or thing. On this principle, *joint creditors*, whether by record, specialty, or simple contract, must all join in an action to recover the debt.(i) So also, in general, *joint tenants* and *coparceners* must, respectively, join in actions to recover the estate, which they respectively hold together(j); and in all actions for injuries to their joint property.(k)

And although tenants *in common* cannot join, in real actions, or in ejectment—because their *interest* is several; yet in personal actions, in which *damages* only are recoverable—as in trespass *quare clausum fregit*, in case for a *nuisance* to their land, and in all actions for injuries to *personal chattels*—they must all join.(l) For in such cases, as the damages are *entire*, and will *survive* entire, to the surviving tenant;

291, f. (n. 4.); Bac. Abr. *Pleas*, &c., B. 2; Co. Litt. 164, a.; 5 Co. 18, b.; 2 Stra. 820, 1146.

(i) 5 Co. 18, b.; Yelv. 177; 1 Saund. 155, 291, f. (n. 4.); 1 Sid. 238; 1 Vent. 34; 3 T. R. 782.

(j) It appears to have been long considered as an established rule of the common law, that joint-tenants and coparceners must, respectively, all join in actions relating to their respective estates. But in some recent cases it has been held that in *ejectment* they may either join or sue *severally*, at their election (12 East, 39, 57; 6 Ib. 173; 11 Ib. 288; *Jackson v. Bradt*, 2 Caines, 169); inasmuch as a *several* demise, by one of the tenants, to the plaintiff in the action, is a *severance* of the joint tenancy or coparcenary. In the State of Connecticut, joint-tenants, coparceners, and tenants in common, have immemorially joined, or severed, at their election, both in ejectment and disseisin. *Millhouser v. Riz*, 1 Root, 246; *Bush v. Bradley*, 4 Day, 298, 303. [So, generally. But if tenants in common sue jointly none of them can recover if one falls. *Davis v. Coblens*, 174 U. S. 719. And see, *Lambert v. Haney*, 100 Ill. 338].

(k) Bac. Abr. *Joint Tenants*, &c., K.; Co. Litt. 180, b.

(l) Litt. § 315; Cro. Jac. 231; Co. Litt. 198, a.; Yelv. 162; Com. Dig. *Abatement*, E. 10; Bac. Abr. *Joint-tenants*, &c., K.

they are in effect *joint*, and so, consequently, is the right of action.

It has already been stated, that where the right of action is in two or more, jointly—as joint obligees, covenantees, &c. the action must be brought by all of them. So also, where one covenants with, or otherwise binds himself to, two or more persons, *jointly and severally*, if it appear from the contract, that their *interest* is joint; they must all, if living, join in the action.(*m*) Thus if A. conveys land to B. and C. *jointly*, and covenants with *both, and each* of them, (thus making the covenant joint and several), that he is well seised, &c.; B. and C. must join in an action on the covenant.(*n*) For when the *interest* of the covenantees is joint, the right of recovery is so: and the defendant ought not to be subjected to *two* suits, for one and the same *entire* cause or thing.

But upon such a covenant, (or, as it seems, even on one that is *joint only*), if it appears from the deed, that the *interest* of the covenantees is *several*; they may sue in separate actions.(*o*) For the interest of the covenantees being several; the *right* to be asserted by action, is consequently several. If then A., by one and the same deed, leases *Black-acre* to B. and *White-acre* to C. and covenants as to the *whole*, with both and each of them; B. and C. may each maintain a several action on the covenant. And the rule, it seems, would be the same, if the covenant had been with *both* the covenantees only, and not with *each* of them.(*p*)

Where one is bound by contract, to two persons, (as B. & C.), *severally, and only* severally, (their interest being also several), they not only may, but it seems must, sue upon it

(*m*) 5 Co. 18, b., 19, a.; 1 East, 497; 1 Saund. 153 & n. 1; Bac. Abr. *Obligation*, D. 3.

(*n*) Id.

(*o*) 5 Co. 18, 19; Bull. N. P. 157–8; 2 Mod. 82; 1 Saund. 154, (n. 1.); 2 Ib. 116, a., b. (n. 2.); 1 East, 497; Yelv. 177.

(*p*) 5 Co. 18; 1 Saund. 154, (n. 1.); Yelv. 177, *Metcalf's* ed., n. 1.

separately. (q) For the case is, in effect, that of two *distinct contracts*, though contained in one instrument. And in such a case, B. & C. *may*, each in his own sole action, declare upon the obligation as one made to himself *alone* without naming the other: this form of declaring being according to the *legal effect* of the contract. (r)

On the *death* of one of two or more *joint* obligees, promisees, &c. the action must be brought by the survivor, or, (if there be more than one) by *all* the survivors. (s) For by the common law, rights of action, vested *jointly* in several persons, survive entire, on the death of any of them, to the survivors, and ultimately to the last survivor (t): but while there are several survivors, the right of action, as between themselves, continues *joint*. If therefore, one of two *joint* obligees in a bond dies, his executor or administrator can neither join in an action upon it, with the survivor, nor sue alone, at law, for the part which belonged to his testator or intestate. (u) For the *remedy*, at law, survives *entire* to the surviving obligee; who however receives the share of the deceased obligee in the avails of the suit, as *trustee* to the personal representatives of the latter, and must therefore account for it with them. (v)

But when the contract is with two or more *severally*, and their interest is several, no right of survivorship accrues between them. In this case therefore, each, on his own death, transmits his several interest, and right of action, to his own representatives (w): the case being in effect,

(q) Cro. Eliz. 729; Mo. 667; Yelv. 25.

(r) Id

(s) 1 Saund. 291, f (n. 4.); 2 Jalk. 444; Carth. 170; Comb. 474; 1 Bos. & P. 445; 1 East, 497.

(t) Id.

(u) 1 East, 497; 1 Bos. & P. 445.

(v) 1 Ves. 242, 252; 1 Ld. Ray. 340; Toller on Ex'rs. 155, 163, 444-5.

(w) Cro. Eliz. 729; 2 Burr. 1197; 1 Saund. 154 (n. 1.).

the same as if a separate contract had been made with *each* of the original parties, for his part of the debt or demand.

Where there are two or more *executors*, named in a will, they must all, if living, join as plaintiffs, or at least be named as such, in personal actions brought in right of the testator. (x) For their rights and interests, as executors, are in so strict a sense *joint*, that they are all considered in law as constituting but *one* officer or representative. (y) And where one of several co-executors, when named as co-plaintiff, refuses to join in pursuing the action, he may be summoned and *served*, i. e. *separated* from the suit—after which, the others may proceed in the action without him (z): since the judgment of severance makes him a *stranger* to the right of action. (a)

On the death of one of several co-executors, the executor of the deceased executor cannot join in actions, with the surviving original executors, nor sue *at law*, at all, in right of the first testator. (b) For rights of action survive *entire*, between co-executors, as between *original* parties having joint rights of action.

Co-administrators also must all, if living, join in actions,

(x) Off. Ex. 42; 9 Co. 37; Toller on Ex. 41, 45, 446; 1 Saund. 291, g; Com. Dig. *Abatement*, E. 13.

(y) Off. Ex. 259; Godolph. 134; Toller on Ex. 243, 359; 3 T. R. 558; Com. Dig. *Administration*, G.

(z) Cro. Car. 420; Toller on Ex. 446; Carth. 61; Dyer, 319, b.

(a) In New York this section must be restricted to such executors as *have qualified*. Executors may *renounce*;—and may be summoned to appear and qualify, and upon failing to do so, may be deemed to have renounced. And where, on the probate of a will, letters testamentary are issued; every person named as executor in the will, but not in the letters, shall be deemed superseded thereby; and *shall have no power, or authority whatever, as such executor, until he shall appear and qualify*. [See N. Y. C. C. P., §§ 2639, 2642.]

(b) Bac. Abr. *Executors*, &c., G.; 1 Ves. 10; 3 Atk. 509; Toller on Ex's. 363.

like co-executors(c); and for the same reason, viz. that their right to sue is *joint*. And on the death of one of them, the right survives to the others, as in the case of executors.(d)

In regard to the joinder of *defendants*, it is a general principle, that where a legal right has been violated, or is withheld, by the *joint* act or *joint* default of two or more persons, they *may* all be joined as defendants in one action, whether it be *ex contractu* or *ex delicto*. And if the action be *ex contractu*, they *must* all, if living, be thus joined; although in actions *ex delicto*, they may generally be joined or not, at the option of the party injured. The reason of the distinction is, that in *contracts*, if the obligation or duty be *joint* only; the non-performance or default, and consequently the *liability*, must be so: whereas if a *tort* is committed by several; the wrong, and the liability, may be treated as *joint* or *several*, at the election of the aggrieved party. For the act of *each* of the wrong-doers is deemed the act of all; and on the other hand, the acts of *all* are, in law, the acts of *each*.

If therefore two or more persons bind themselves, by a joint contract of any kind; they must all, if living, be joined as defendants, in an action for the breach of it.(e) And the rule was formerly held to be the same, in actions *ex quasi contractu*—as in actions against carriers, or other bailees, for *negligence* or *breach of trust*.(f) But it is now held to be unnecessary, in this class of actions, to join, as defendants, all the parties who are liable, *unless* the action is founded on contract, so that to support it a contract between the parties to the suit must be proved. If the action is so founded, all must be joined as defendants, though the action is in form

(c) Com. Dig. *Abatement*, E. 14; Ib. *Pleader*, 2 D., 10; Toller on Ex's. 448.

(d) Bac. Abr. *Executors*, &c., G.; 2 Vern. 514; Lovelass, 21.

(e) Bac. Abr. *Obligation*, D. 4; 5 Co. 19; 1 Saund. 154, (n. 1.), 291, (n. 2.); 5 Burr. 2611; 2 Black. Rep. 947.

(f) Carth. 162-3; 1 Freem. 499; 1 Saund. 291, d., n.; 6 T. R. 369.

ex delicto. This principle reconciles all the recent cases. (*g*) Thus, if in an action against carriers, the plaintiff declares against them on the *custom of the realm*, and alleges a breach of duty imposed by that custom; he alleges a *breach of law*, which needs not the aid of a *contract* to enforce it, and of course he need not sue all the persons who are liable: otherwise, if he declares on *contract*. (*h*)

And if one of several persons, bound by a *joint* contract, dies; the action must be brought against the survivor: or if there be more than one survivor, against all of them. (*i*) For joint liabilities survive entire, *against* survivors, as do joint rights, in their *favor*. And therefore, the personal representative of the deceased party is not liable, at law, either as a co-defendant with the survivor, or in a separate action. (*f*)

But if two bind themselves by contract, *jointly and severally*; they may both be joined as defendants in one action; or either, or each of them, may be sued in a separate action. (*k*) For when the contract is in this form, the obligation, created by it, may be treated as either joint or several, at the election of the party, who is entitled to recover for the breach of it. For the liability, considered as *several*, is virtually the same as if it had been created by two several and *distinct contracts*, for the performance of one and the same duty. The plaintiff is ultimately entitled, however, to only one satisfaction in the whole.

If *three* persons bind themselves by a *joint and several*

(*g*) 5 T. R. 649; 2 N. Rep. 365, 454; 3 East, 62; 12 East, 89, 452; 6 M. & S. 385; 6 Moore, 141; 3 Brod. & Bing. 54. *Vide* 5 B. & A. 653.

(*h*) In New York the statute provisions, as to carriers, are peculiar; and essentially vary the common law rules. But they are too numerous, and too long, to be here inserted in detail.

(*i*) 1 Saund. 291, (n. 2.); 2 T. R. 477-8; 6 Ib. 365; 5 Esp. Rep. 32; 1 Salk. 393. *Vide* 4 B. & A. 374.

(*j*) Carth. 105; 1 East, 400; 2 Burr. 1196; 2 Vern. 99.

(*k*) Bac. Abr. *Obligation*, D. 4; 1 Saund. 153, (n. 1.); 291, e. (n. 4.); 2 Vern. 99; 8 Mod. 166; 1 Stra. 76, 553; Yelv. 27; 1 Sid. 238.

contract; they may be sued jointly or severally, as in the last case(l): but *two* of them cannot be sued together, in one action, while they are all living, without the other.(m) For the plaintiff must treat the contract as *altogether* joint, or *altogether* several. An action, *partly* joint, and *partly* several, *quoad* the parties liable, being unknown in the law. But in the case, now supposed, if the plaintiff sues two, and only two of the three, in one action; he, by joining the two, treats the contract so far as *joint*; while by not joining the third, he treats it as *several*.

When two or more bind themselves *jointly and severally*, if either of them dies, his personal representatives is liable to an action at law upon the contract.(n) For if the plaintiff elects to sue upon the contract as *several*; its legal operation, (as has been before stated), is the same as if the parties, originally bound, had made, each a several contract for the performance of the same duty.—When two or more bind themselves *severally* and not otherwise, the rule is of course the same.

But in neither of these last cases, can the executor of the deceased party be joined in an action with the survivor(o). For as the former can be subjected at law, only when a *several* liability devolves upon him; it is manifest that he cannot be liable *jointly* with any of the original parties. Besides, a judgment against the executor must be *de bonis testatoris*; whereas against the survivor, it would be *de bonis propriis*: so that no one final judgment, (and the law allows but one, in one action), would be adapted to such a joinder of defendants.

Where a right of action exists against *co-executors*, as

(l) Id.

(m) Hardr. 198; Bac. Abr. *Obligation*, D. 4; 1 Sld. 238; 2 Ib. 12; Cro. Eliz. 494; 3 T. R. 782; 1 Saund. 291, e. (n. 4.)

(n) Carth. 171; 2 Lev. 228; 2 Burr. 1196.

(o) Carth. 171; 2 Lev. 228; 1 Chitt. Pl. 37.

such, all those of them, who have *acted* in the execution of the trust, must be joined in the action; but those, who have not administered, may be omitted.(p) For though the liability of co-executors is *joint*; yet a stranger or creditor is presumed not to know who, or how many they are, except from their *acts*; and is therefore not bound to take notice of any others, than those who administer.(q)

If several persons join in committing a *trespass*, or *tort* of any kind; the party injured may generally, at his election, sue them all *jointly*—or each, or either of them, in a several action—or any number of them, less than the whole together.(r) For *torts*, in which several join, may be considered, in regard to the wrong-doers, either as *wholly* joint, or *wholly* several—or as joint in respect to part of them, and several, as to the others: since the act of any one of the wrong-doers may be regarded in law, either as his own sole act, or as the act of either, or of all, or of any number of them.

In general also, if several are sued, as for a *joint* tort; one or more of them may be convicted, and subjected in damages, although others of them be acquitted.(s)

To the general rule, that joint wrong-doers are suable severally, as well as jointly, there is an exception, where a personal action *ex delicto* concerns, or arises out of, *real property* held by two or more persons together. Hence, if one of two joint tenants, parceners, or tenants in common, is sued alone, for not setting out *tithes* accruing from the land held by both; or for the neglect of any other duty, arising from their *holding together in common*; the non-joinder of

(p) Off. Ex. 95; 1 Lev. 161; 3 T. R. 557; 1 Sid. 242; Toller on Ex. 471.

(q) This section, so far as executors are *defendants*, is substantially the same as the New York rule, under its statutes.

(r) Bac. Abr. *Pleas*, &c., B. 2; Ib. *Actions in Gen.*, B.; Carth. 171, 294, 361; 5 T. R. 649; Com. Dig. *Abatement*, F. 8; 6 Taunt. 29.

(s) 1 Saund. 291, d. (n. 4.); 1 Salk. 32; 6 T. R. 766.

the other tenant is pleadable in *abatement*.(t) The reason of the rule probably is, that in every such suit, the rights and interest of *both* tenants are necessarily in question: a reason not applicable to cases, in which a tort, committed by several, does *not* arise out of, or concern any joint or common estate of their own.

Two persons are not suable in one action for distinct torts committed by them *severally*, against one and the same person; there being, in such a case, no *joint* wrong.(u) Thus, if A. and B. at the same time and place, utter the same slanderous words concerning C.; the latter cannot for this cause, join them as defendants in one action(v): for the act of *speaking* cannot be a *joint* act.

But two or more may be joined as defendants, in an action for publishing a *libel*(w): this being an act, which any number of persons, may commit *jointly*. The same rule applies, and for the same reason, to actions for *malicious prosecution*.(x) And in this, as also in the last case, any one of the wrong-doers may be sued alone; or the whole, or any number of them, may be joined in one action, as in other cases of joint wrongs.

(t) 5 T. R. 651; Black. Com. 182; 1 Saund. 291, e. (n. 4.); Com. Dig. *Abatement*, F. 6. *Vide* 14 Johns. 426; 4 Pick. 308; 10 Mass. 377-9.

(u) Bull. N. P. 5; 2 Saund. 117, a. (n. 2.); 1 Bulstr. 5; Esp. Dig. 504; Bac. Abr. *Pleas*, &c., B. 2; Cro. Jac. 647; Palm. 313.

(v) *Id.*

(w) 2 T. R. 199; 2 Burr. 985; 2 East, 426.

(x) 2 Saund. 117, a. (n. 2.); Bac. Abr. *Pleas*, &c., B. 2; *Ib. Actions in Gen.*, B.; Latch, 262; Bull. N. P. 5. *Vide* 17 Mass. 182; Hammond on Parties, 85, 86.

CHAPTER III.

JOINDER OF CAUSES.

It is laid down as a general rule of the common law, that where several causes of action, of the *same nature*, exist between the same parties, all accruing to the plaintiff in the *same right*, and against the defendant in the *same character* or capacity, they may all be joined, by several counts, in one declaration. (a) For there is no principle of law, limiting a

(a) Com. Dig. *Action*, G.; 8 Co. 87, b.; 1 Wils. 248; 2 Ib. 319; Bac. Abr. *Pleas*, &c., B. 3; Comb. 244.

[A plaintiff may join all his causes of action in one declaration, if, in separate suits, he could recover on each in the same form of action. *Randall v. Circuit Judge*, 96 Mich. 284, 286. If the nature of two causes is essentially different they cannot be joined even in the Code States. *Drexel v. Hollander*, 112 App. Div. 25. And it is held in New York that slander cannot be joined with malicious prosecution (*Green v. Davies*, 182 N. Y. 499), nor with false imprisonment even if they originated simultaneously (*De Wolfe v. Abraham*, 151 N. Y. 186). *Contra*, see, *Slater v. Walter*, 148 Mich. 650.

The New York Code of Civil Procedure (§ 484) after enumerating the causes of action that may be united in one complaint provides that "it must appear on the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other, and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial." A cause of action for damages for breach of contract, and another for damages for fraud in inducing the plaintiff to make it, are not "consistent with each other" within this provision. *Edison Electric Illuminating Co. v. Kalbfleisch Co.*, 117 App. Div. 842. A count in tort cannot be joined with one in assumpsit. *Penn. R. Co. v. Smith*, 106 Va. 645.

suit to a single cause of action; and where several rights of recovery can be enforced, as well by one action as by several,

Single Cause of Action.—The Code, however, does not assume to define a single cause of action. And in defining the term the courts themselves have not agreed. Thus, in England and in some States it is held that damages to person and to property occasioned by one wrongful act give rise to different causes of action. Other courts hold that but a single cause of action arises out of such a condition of facts. By reason of the great difference between the rules of law applicable to the injuries of the person and those relating to injuries to property, the Court of Appeals of New York has held that an injury to person and an injury to property, though resulting from the same tortious act, constitute different causes of action. *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40. And this appears to be the better rule and the sounder reason.

The infallible test by which to determine whether a complaint states more than one cause of action, is—"Does it present more than one subject of action or primary right for adjudication?" *Adkins v. Loucks*, 111 Wis. 587, 595; *Gager v. Marsden*, 101 Wis. 598.

When the facts alleged show one primary right of the plaintiff and one wrong done by the defendant which violates that right, the complaint states but a single cause of action, no matter how many forms and kinds of relief the plaintiff is entitled to. *City of New York v. Knickerbocker Trust Co.*, 104 App. Div. 223. The relief being no part of the cause of action, the fact that different kinds of relief are asked for does not determine whether or not a cause is single. *Keens v. Gaslin*, 24 Neb. 310, 316; *Hahl v. Sugo*, 169 N. Y. 109 (citing Pomeroy's Code Rem., § 455). So, in seeking a partnership accounting, if it is necessary first to set aside an agreement that relief may be asked for as well as the accounting. *Smith v. Irvin*, 108 App. Div. 218. So, if parties have one connected interest centering in the point in issue as the cause, or one common point of litigation, they may be joined though different forms of relief are sought against them. *Whiting v. Elmira Industrial Assn.*, 45 App. Div. 349, 354, citing *Mahler v. Schmidt*, 43 Hun 514.

The necessity of properly exhibiting to the court this "primary right" furnishes another reason why the declaration or complaint should contain a clear and concise statement of the facts. See *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 111 Fed. 135.

Separate Elements of Damage.—The statement of separate injuries as elements of damage resulting from the one cause does not constitute a distinct cause. *Procter v. So. Cal. Ry. Co.*, 130 Cal. 20.

"Transaction."—The wrong may consist of several acts as a part of one transaction. *Oliver v. Perkins*, 92 Mich. 304; *Earl & Wife v.*

a joinder of them is advantageous to both parties, and favored by the policy of the law. By causes of action "of the

Tupper, 45 Vt. 275. And so, under the Code, provision is made for the joinder of "claims arising out of the same transaction, or transactions connected with the same subject of action, and not" otherwise provided for. See *Rogers v. Wheeler*, 89 App. Div. 435; *Campbell v. Hallihan*, 45 Misc. 325, holding an assault committed after a conversion to be not a part of the "transaction."

The test of a transaction is not proximity in point of time, but relation (*First Nat. Bk. of Paducah v. Wisdom's Executor*, 111 Ky. 135), and that both causes have proceeded in a general sense from the same wrong (*Lamming v. Galusha*, 135 N. Y. 239, 244).

Though any number of negligent acts preceding an injury, and leading up to and contributing to it may be set forth in the same count, if of the same character, an action for damages at common law for negligence cannot be joined in the same count with one for statutory negligence, for the reason that they are not dependent upon each other. But if only the one transaction is involved the causes of action may be joined in the one petition. *McHugh v. St. Louis Transit Co.*, 190 Mo. 85.

In the *Connecticut Practice Act* the term is applied "to any dealings between the parties resulting in wrongs, without regard to whether the wrong be done by violence, neglect, or breach of contract." *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551.

Though different rules of damage may be applicable to two causes of action stated in a complaint (as, for example, a cause of action for breach of contract for the exchange of personal property and one for fraud in inducing the plaintiff to part with his property by means of false representations), yet when a recovery may be had upon only one of them, and both arise "out of the same transaction or transactions connected with the same subject of action," both causes should be stated in one count. *Dawson v. Marsh*, 74 Conn. 498; *Knapp v. Walker*, 73 Conn. 459; *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, *supra*.

The policy of the law in discouraging litigation plays some part in deciding what causes of action may be joined. Thus, in *Nemecek v. Flier and Stowell Co.*, 126 Wis. 71, the plaintiff joined a cause of action for damages for pain and anguish suffered by her intestate as the result of injuries received through the defendant's negligence with one for pecuniary loss to the father and mother of the deceased resulting from the death, and it was held properly, following *Raney v. St. J. & L. C. R. Co.*, 64 Vt. 277; *Ill. Cent. R. Co. v. Crudup*, 63 Miss. 291].

same nature," are here meant such as require, at common law, *the same judgment*, viz. a *capiatur*, or a *misericordia*.

The meaning of the above general rule then is, that where several distinct causes of action, existing between the same parties, and accruing in the manner mentioned in the rule, *all* require, at common law, either the judgment of *capiatur*, or that of *misericordia*, they may all be joined in one declaration.(b)

If therefore A. has several causes of action against B., arising upon several *bonds*—or upon several *covenants*, though contained in several different deeds—or upon several different *promises* even though some of them be in writing, and others not; all the demands, in each of these cases respectively, (if they accrue in the manner before mentioned), may be joined by as many different counts in one declaration.(c) For they all require at common law, the same judgment: viz. a *misericordia*. It may be added, that the several rights of action, in each of the cases, now supposed, all require the same *general issue*.

In the same manner, several *trespasses*—as assault and battery, false imprisonment, and trespasses upon property, either real or personal—may all be joined.(d) For all the several causes of action require at common law, the same *judgment*, (viz. a *capiatur*); and the same general issue, (*not guilty*), is adapted to all of them.

Upon the same principle, several trespasses *on the case ex delicto*—as slander, trover, malicious prosecution, fraud, breach of trust by bailees or agents, nuisance, disturbance, &c.

(b) *Id.*

(c) Com. Dig. *Action*, G.; Bac. Abr. *Pleas*, &c., B. 3; *Actions in Gen.*, C.; 1 T. R. 276; 2 Wils. 319; 1 Ib. 252; 2 Saund. 117, c.; 1 Vent. 366.

(d) 8 Co. 87, b.; 2 Saund. 117, b. (n. 2.); 6 Cranch, 226; Bac. Abr. *Pleas*, &c., B. 3; Com. Dig. *Action*, G. 4; Bac. Abr. *Actions in Gen.*, C.

—may all be joined.(e) For all these require the judgment of *misericordia*, at common law; and *not guilty* is the proper general issue to all of them.

It is not indispensable, however, in order to justify the joinder of different causes of action, that they should all require the same *general* issue: in other words, the fact that they require *different* general issues is, *per se*, no objection to their joinder; although as will presently appear, the fact of their requiring different *species or forms of action*, is so.

Hence, debt on *judgment*—debt on *specialty*—and debt on *simple* contract—may all be joined in one action(f); although the general issue, in the first case, is *nul tiel record*—in the second, *non est factum*—and in the third, *nil debet*. For the same judgment, (a *misericordia*) being adapted to all the three rights of action; their joinder is warranted by the express terms of the first general rule, to which the difference in the *pleas* is not considered as affording sufficient ground for an exception.

Upon the same principle, *debt* and *detinue* may be joined in one action.(g); although they require different general issues. For not only is the judgment at common law, the same in both: but the actions of debt and detinue are essentially the same in character: the only material difference being, that one is brought for a sum of *money*, and the other for the recovery of specific chattels.(h)

(e) Com. Dig. *Action*, G.; 1 Wils. 252; 2 Ib. 319; 3 Ib. 349, 456; Hob. 6; Cowp. 230; Doug. 678; 3 East, 70; 1 T. R. 274, 277.

(f) 1 Vent. 366; Cro. Car. 316; 2 Saund. 117, b. (n. 2.); Bac. Abr. *Pleas*, &c., B. 3; 1 Wils. 252; 1 T. R. 276; 13 Johns. 462.

(g) Bac. Abr. *Pleas*, &c., B. 3; 5 Mod. 92; 2 Saund. 117, b. (n. 2.); 1 Wils. 252.

(h) Some doubt has been expressed of the original correctness of the rule allowing debt and detinue to be joined in one action. (2 Saund. 117, b. n. 2.) But the rule itself is well established by authority; and from the reason suggested in the text, it would seem that no general *principle* is violated by it.

Such causes of action *cannot* be joined, under the New York Code :

On the other hand, where several causes of action require *different judgments*, at common law—as where the judgment of *capiatur* is adapted to one of them, and a *miseri-cordia* to the other—the rule is universal, that they cannot be joined in one action. (i) For there can be but *one* judgment *quod recuperet*, in one action; and if such causes of action were joined, no one judgment, known to the law, would be adapted to all of them.

For this reason, a count in *trespass* for an injury either to person or to property, can never be joined with trespass *on the case*, even when the latter arises *ex delicto*. (j) Thus assault and battery, false imprisonment, or trespass upon property of any kind, cannot be joined with trover, slander, fraud, malicious prosecution, or any other wrong unaccompanied with *force*. (k) For though all these causes of action require the same *general issue*; yet trespass and case require, at common law, different *judgments*—the former a *capiatur*; the latter a *miseri-cordia*.

Trespass can, in no instance, be joined in one action with any kind of *contract*. (l) For such a joinder would require, not only different *judgments*, at common law, but also different *general issues*.

And the general rule that where several causes of action, all require the *same judgment*, at common law, they may all be joined in one declaration, is not *universally* true. For a joinder of different demands is never allowed, where it would occasion the blending of different *forms* or *species* of

—for one requires a *summons*, which asks to recover a *specific sum of money*; and the other, a *summons* asking for “*the relief*,” &c. Code, § [418]. See *Cochran v. Webb*, 4 Sandf. 653; *Dobson v. Pearce*, 1 Duer, 142.

(i) Gilb. H. C. P. 7; Com. Dig. *Action*, G; 2 Saund. 117, b. (n. 2.); 1 Salk. 10.

(j) Bac. Abr. *Actions in Gen.*, C.; 1 Ld. Ray. 273-4; 2 Saund. 117, e. (n. 2.)

(k) Id.

(l) Id.

action, even though the *same judgment* would be adapted to all of them.

And therefore, *debt, covenant broken, account, and assumpsit*, cannot be joined in one action, nor can either of them, it seems, be joined with any of the others—although they are all founded on contract, and all require the same judgment, at common law: viz. a *misericordia*.(m) For as, (with the exception of the two first), they require different *general issues*; and more especially, as the *forms* of action adapted to them are essentially different; the joinder of them, or of any of them, would tend to confusion and perplexity in the administration of justice.(n)

A *fortiori* tort of any kind, though unaccompanied with force, (as trespass on the case, *ex delicto*), can never be joined with any separate demand founded on *contract*.(o)

Thus *trover, slander, &c.* can never be joined with *debt, covenant broken, account, or assumpsit*—although the judgment of *misericordia* is, at common law, adapted to all of them.(p) For these two classes of actions are different from each other, not only in form and species, like those last mentioned; but *generically* different.

It has been said, however to be a *universal* rule, that when several causes of action, accruing between the same parties,

(m) Bac. Abr. *Actions in Gen.*, C.; 1 Chitt. Pl. 199.

(n) As in the Code States there are no *forms of action*; and as all these actions are founded on *contract*; the causes of all such actions may, there, be joined, in one complaint. A *summons upon contract*, —(i. e., asking to recover a sum of money, specified as to each cause of action, or stated in the aggregate,) would cover them all. This, however, would not be true of *covenant broken*, where the covenant was to do a *specific act*, (as to make repairs;) since then the claim would be for *unliquidated damages*; and the summons must be one "*asking relief*," &c. See *Cobb v. Dunkin*, 19 How. 164; [§ 484, N. Y. C. C. P.; and *supra* this chapter].

(o) 1 Vent. 366; Bac. Abr. *Actions in Gen.*, C.; Willes, 118; 1 T. R. 276-7; Carth. 189; 3 Wils. 354; 6 East, 335.

Note the case of *debt* and *detinue*, referred to *supra*.

(p) Id.

and in the same capacities, all require, not only the *same judgment*, at common law, but *also the same general issue*, they may be joined in one action. (q) That this position is *generally* true, there can be no doubt—as is manifest from various examples already given: but its *universality* appears at least questionable. For it seems agreed that *debt* on bond, and *covenant broken*, cannot be joined; though the same judgment at common law, and the same general issue, are common to both of them. And in tort, *quære*, whether an English *ejectment* can be joined with *any* count in simple trespass? (r)

But distinct causes of action, though of the same nature, and between the same parties, cannot be joined, unless they all accrue to the plaintiff in one and the *same right*, and against the defendant in one and the same capacity. And therefore an *executor* cannot join a promise, made to his testator, with one made to himself, in his own individual capacity (s): the principal reason of which is, that on the finding of entire damages, it would not appear from the record, how much of the amount found was assessed *as assets*, in right of the *testator*, and how much, in the plaintiff's *individual* right. Indeed the two claims, accruing in these two different rights, belong in effect to *different persons*. Another objection, indeed, to such a joinder, is that the rule in regard to *costs*, on the two counts would be different in the event of the suit's failing: an executor, when suing *as such*, and solely in right of his testator, not being liable to *costs*. But this last consideration seems not now to be regarded as decisive. (t)

(q) 1 T. R. 276. And see 2 Saund. 117, c. (n. 2.)

(r) Bac. Abr. *Actions in Gen.*, C.; Thel. Dig. 191; Hob. 249; 1 Brownl. 235.

(s) 2 Saund. 117, d.; 1 Salk. 10; 1 T. R. 489; 3 Ib. 659; 4 Ib. 277; 1 Wills. 171; 3 Bos. & P. 7; 2 Stra. 1271. [Actions which do not affect the plaintiff in the same capacity cannot be joined. *Hawarden v. Y. & L. Coal Co.*, 111 Wis. 545].

(t) 6 East, 411, 412.

The joinder supposed, in the example last given, is not termed a misjoinder of *causes of action* (for these are of precisely the same nature in both counts); but a misjoinder of *counts*. In strictness, however, it seems most to resemble a misjoinder of *plaintiffs*: the two different *capacities*, in which the plaintiff sues, being analogous to the joinder, as plaintiffs of two different *persons*, having several distinct rights.—In the application of the above rule there has been some diversity of opinion, and consequent confusion in the adjudged. (u)

It appears at length however, to be established, notwithstanding some opinions to the contrary (v), that where a declaration *by* an executor or administrator, consists of several counts, which in their own nature admit of a joinder—if the whole avails of a recovery upon all of them would be *assets* in his hands; the counts, (so far as depends upon the *capacity* in which the plaintiff sues), are well joined (w): because, in every such case, the causes of action, laid in the several counts, all accrue to the plaintiff in one and the same *right*—that of his *testator*, or *intestate*.

On the other hand, different counts, charging the defendant in two *different capacities*, cannot be joined in one declaration. And therefore, a demand *against* an executor or administrator, *as such*, (i. e. charging him for any duty of his *testator*, or *intestate*), cannot be joined with another, accruing against him in his own *personal capacity*. (x) thus in an action against an executor or administrator, a count on a bond or promise made by his *testator* or *intestate*, cannot be

(u) 6 East, 409, 410, 411; 2 Saund. 117, c., d. (n. 2.); 1 Wills. 172.

(v) 2 Saund. 117, d. (n. 2.) And see 7 T. R. 358–9.

(w) 6 East, 405; 3 Ib. 104; 5 Ib. 150; 2 Lev. 165; 3 Ib. 60; 1 T. R. 487; 3 Ib. 659, 660; 4 Ib. 281; 2 Saund. 117, d. (n. 2.), 208; 6 Taunt. 453; 5 Price, 412; 7 Ib. 591.

(x) 2 Saund. 117, d. (n. 2.); Hob. 88; and *notis Williams*, 2 Lev. 228; 4 T. R. 347; 2 Bos. & P. 424; 1 Chitt. Pl. 205; Archb. Civ. Pl. (Amer. ed.) 175.

joined with a count on a bond or promise made by *himself* in his *personal* capacity. For the judgment, required on the first count, would be *de bonis testatoris*, &c. and that on the second, *de bonis propriis*. Such a joinder however, would not be a misjoinder of *causes of action*, (these being both of the same nature) ; but a misjoinder of *counts*.(y)

The joinder of causes of action, or of counts, which the law does not allow to be joined, is fatal to the declaration, not only on demurrer, but on motion in arrest of judgment, after verdict, or on writ of error.(z) For the joinder *might*, if sanctioned, require, in the one case, *two* final judgments of different kinds, and in the other, two of the same kind, in one action: whereas the law allows but *one* such judgment, in any civil action. But if, where counts are misjoined, a verdict is found for the plaintiff on *one count*, or on two or more counts that are *well joined*, and for the defendant on the other, or others; the misjoinder is cured.(a)

In connexion with the last rule, it is proper to remark, that *misjoinder* of causes of action, or counts, which is a radical fault, is essentially different from *duplicity*, which is but matter of *form*.

Misjoinder of causes of action, or counts, consists in joining, in different counts in one declaration, several different demands—which the law does not permit to be joined—to enforce several *distinct, substantive* rights of recovery: as,

(y) In section [484] of the N. Y. Code, the words, “must affect all the parties to the action,” are certainly *not* inconsistent with the rules in the text: possibly they might be said to carry a similar meaning. At any rate, the rules of the text are still applicable here.—Since, however, this is so, it would hardly seem that the words, (in that section [484]) “must not require *different places of trial*,” can be of much *practical value*. Their *effect follows* from the prior provisions.

(z) Bac. Abr. *Pleas*, &c., B. 3; Mo. 419; 1 T. R. 274; 1 H. Black. 108; 2 Bos. & P. 424; 1 Salk. 10; Carth. 436; 7 Taunt. 581.

(a) 2 M. & S. 533—overruling 3 Lev. 99; 2 Ib. 101; T. Ray. 233; *vide* 11 Mod. 196, 256; 1 Brownl. 235; Hardr. 166; 3 T. R. 433.

where a declaration joins a count in *trespass* with another in *case*, for distinct wrongs—or one count in *tort*, with another in *contract*.

Duplicity in a declaration consists in joining, in one and the same count, different grounds of action, of different natures, or of the same nature, to enforce only a *single* right of recovery. This is a fault in pleading, only because it tends to useless prolixity and confusion, and is therefore only a fault in *form*.

Thus where the plaintiff declared, in *one count*, that whereas he had bailed to the defendant a horse, to be ridden from L. to E., and there to be safely redelivered to the plaintiff; the defendant, *intending to deceive* the plaintiff, rode the horse from L. to E. and *from E. to L.* again; and by riding so far, *abused* the horse, &c.; and also, that the defendant had *refused to redeliver* the horse on demand, and *converted him* to his own use—it was held that the declaration was demurrable, for *duplicity*.(b) For the declaration, in one count, stated two or three *distinct* grounds of action, sounding in both *contract* and *tort*; though the plaintiff's loss, or damage sustained, entitled him to only a *single, entire* right of recovery—which he might have enforced, by declaring in only one form of action.(c)

(b) Cro. Car. 20; Bac. Abr. *Actions in Gen.*, C.

(c) The New York Code (§ 167) says that different causes of action when properly joined in *one complaint*, "must be *separately stated*." The case put, in the text, would be bad, under that section; and *duplicity* remains a fault in pleading, under the Code. Though called, by our courts, the *improper uniting* of causes of action;—(and being *thus* held a ground for *demurrer*, within section [488] of the Code;—) the fault really is, that the causes are *not* "*separately stated*."—(8 How. Pr. 177; 9 Ib. 198, 311, 342; 10 Ib. 361.) It is stating *several* causes of action, *as one*. Had the Code but used a well-known *legal term*, and said that different causes of action must be stated in different *counts*; the rule would have been entirely clear: and no doubt could have arisen, whether or not this fault were cause for a demurrer. But, though there are decisions that it is not cause for a demurrer; it would seem, on principle, too

So also, if the obligee in a penal bond declares upon it *specially*, by setting out the condition, and assigns more than one breach; the declaration is, by the common law, *double*. (d) For by the common law, *one* breach works a forfeiture of the whole penalty; which is all that could be forfeited by any number of breaches.

When a declaration is ill, for *misjoinder* of causes of action, the plaintiff, may, with leave of the court, *amend* it on payment of costs, by *striking out* one or more of the counts, and thus leaving upon the record but one count, or such only as are rightly joined. (e) And if the declaration has not been *demurred* to, he may also cure the mistake, by entering a *nolle prosequi* upon one or more of the counts. (f)

But it has been several times held, that *after* demurrer to a declaration, for such a misjoinder, the plaintiff cannot cure the mistake by entering a *nolle prosequi* upon any of the counts (g): since to permit this, would enable him, by his own act, and without paying costs, to defeat a demurrer well taken, and for a sufficient and *substantial* cause. (h)

plain to admit of question. See 11 How. Pr. 412, for a plain statement of the *reason*; though given on a *motion* to amend. [The Code now (sec. 483, amending sec. 167) declares that the facts constituting each cause of action must be separate and numbered. See *Rockey v. Hazlett*, 91 App. Div. 181. The remedy for failure is a motion. *Boss v. Comstock*, 38 N. Y. 21.]

(d) Com. Dig. *Pleader*, C. 33; 2 Co. 4, a.; 1 Saund. 58, (n. 1.); 2 Vent. 198.

(e) 4 T. R. 347-8, 360.

(f) Id.; 1 Saund. 207, c. (n. 2.); 285, (n. 5.); 1 Chitt. Pl. 206. Entering a *nol. pros.* is precisely equivalent to the present practice, of *withdrawing*, or *abandoning*, at the trial, one of two causes of action, improperly joined in a complaint.

(g) 4 T. R. 347 360; 1 H. Black. 108; 1 Saund. 207, c. (n. 2.) *Cont.* 1 Bos. & P. 157; 2 Ib. 77.

(h) In New York a plaintiff can amend *once*, of course, and *without* payment of costs; within the time specified by statute; (Code, § [542]) :—thereafter, on motion and *payment of costs* [upon such terms as justice may require. Code, §§ 723, 724. See *supra*, AMENDMENTS], and either *before*, or *after*, judgment.

Where one brings several *suits* upon several distinct demands, which *might* all have been joined in one action, the court may, upon the defendant's motion, compel a *consolidation* of them—that is to say, may order all the declarations in the several action, to be inserted, as so many *counts*, in one declaration (*i*): it being unreasonable that the defendant should be harassed with several suits, where one would answer all the purposes of justice.

The interposition of the court, for this purpose, is however discretionary (*j*): an order for consolidating actions being only a matter of *practice*. But when a consolidation is ordered, the costs of the application are, regularly, to be paid by the *plaintiff*. (*k*) For the institution of several suits, where all the ends of justice might have been attained by one, is considered as vexatious and oppressive. (*l*)

(*i*) Bac. Abr. *Pleas*, &c., B. 3; Comb. 244; 2 T. R. 639; Com. Dig. *Action*, I. [See N. Y. C. C. P., §§ 817–819.]

(*j*) 2 Stra. 1149, 1178; Com. Dig. *Action*, I. [See *Mason v. Evening Star*, &c., Co., 35 Misc. 77].

(*k*) 2 T. R. 639; Tidd, 556.

(*l*) Several suits, laid in different counties, for the publication, in one number of a newspaper circulated in all those counties, of the *same libel*; have, in the New York Supreme Court, been consolidated into one, by GOULD, J.; and the practice was generally approved. *Sixty* suits, (one in each county of the State,) were plainly 'vexatious and oppressive.'

DIVISION IV.

OF DILATORY PLEAS.

CHAPTER I.

GENERAL CONSIDERATIONS.

DILATORY pleas as usually distinguished, for the purpose of settling the *order* of pleading, are,

1. To the *jurisdiction* of the court:
2. To the *disability of the person*,
 - a. Of the plaintiff, and
 - b. Of the defendant:
3. To the *count*, or *declaration*:
4. To the writ—viz.
 - a. To the *form* of it, and
 - b. To the *action* of it.(a)

But this division of pleas to the *writ* is seldom if at all regarded, it seems, in modern practice.

Any or *all* of these pleas may be used, *successively*, in one and the same case, if pleaded within the time allowed for dilatory pleas by the rules of practice.(b) This rule, how-

(a) Co. Litt. 303; Reg. Pl. 54; 1 Tidd, 572; Bac. Abr. *Pleas*, &c., A; 3 Inst. Cler. 5; Lawes' Pl. 37.

(b) Co. Lit. 304, a; Carth. 8, 9; Bac. Abr. *Pleas*, &c., K. 1; 1 Tidd, 572; Lawes' Pl. 107; Com. Dig. *Abatement*, 1, 3, 4.

[It has been pointed out, heretofore, that dilatory pleas must be filed at the earliest practicable moment. See *Fisher v. Cook*, 125 Ill.

ever, means only, that when a dilatory plea has been overruled, the defendant is still at liberty to plead, (within the proper time), any other *plea*, which, in the above enumeration, is *subsequent* to that which has been overruled. The rule is, therefore, to be understood with the two following restrictions: a, That the latter plea be not *repugnant* to the former; and b, That the defendant do not *invert* the established *order* of pleading—or in other words, that the latter plea be not such as is *waived* by the former. (c)

But after any dilatory plea has been overruled, no second plea of the *same kind, or class*, can be admitted. (d) If it were otherwise, dilatory pleas might, except for the restrictions imposed by positive rules of *practice*, succeed each other beyond all definite limits. (e)

280. Even ignorance of a cause of abatement will not justify the filing of a plea after the time limited. *Huntley v. Holt*, 59 Conn. 102].

(c) Com. Dig. *Abatement*, I. 4.

(d) Bac. Abr. *Abatement* M; *Ib. Pleas, &c.*, K. 1; Hetl. 126; 12 Mod. 230; Doct. Pl. Introd. V; 8 Cush. 301.

(e) By § [487] of the New York Code, there is but *one* kind of dilatory plea; and that is called a demurrer; the causes for which are specified in § 144 [488] of the Code. And in § [490] the Code says 'the demurrer shall distinctly specify the objection to the complaint.'—This use of the *plural* form would seem to mean, that the defendant, on the first taking of a demurrer, must specify *all* the faults in the complaint, of which he means to take advantage. If so, the rules in the text would seem entirely inapplicable here. But, if a defendant wishes to plead to the *jurisdiction*; there seems to be no propriety,—(whether he does it by demurrer, or by answer,)—in his submitting to a court, which he claims *cannot pass on it, any subsequent plea*,—(either *with* the first, or *before* the first be *decided*, and decided in *favor* of the jurisdiction;)—even though such subsequent plea be for one of the causes for the (so-called) demurrer. (See Code, § 148. *People v. Banker*, 8 How. Pr. 258; *Wilson v. Mayer*, 15 Ib. 500; *Sweet v. Tuttle*, 4 Kern. 469.) However that may be, it is held that a defendant *cannot demur, and answer, to the same matter*. *Munn v. Barnum*, 12 How. Pr. 563. And this would seem entirely unobjectionable; and indeed the only legitimate rule, in view of section [966] of the Code; which provides that where there is an issue

Nor is the defendant allowed to plead simultaneously, to the same thing or point, *two* dilatory pleas of the same kind, (as two *outlawries* of the plaintiff), or two of the same *class*, as (*outlawry* and *alienage*.) For this would amount to *duplicity*, which the rules of pleading forbid. (f)

Neither can he plead, at one time, two dilatory pleas of *different* classes or degrees, either to the *whole*, or to the *same*

of law,—a demurrer,—(even though there be, in the same case, an issue of fact;)—the issue of *law must be tried, before any issue of fact* can be: Thus leaving a party full opportunity to answer, upon the fact *after* the decision of the demurrer. And, in practice, this is frequently, and properly allowed to be done.

[In New York, and generally under the codes as has been pointed out, the only pleading on the part of the defendant is either a demurrer or an answer. N. Y. C. C. P. § 487. *Varum v. Taylor*, 59 Hun' 554. By § 488 of the N. Y. C. C. P. the defendant may demur to the complaint when it appears upon the face thereof that the court has not jurisdiction of the person of the defendant or of the subject of the action; that the plaintiff has not legal capacity to sue; that there is another action pending; that there is a misjoinder of parties plaintiff, or a defect of parties plaintiff or defendant, or an improper joinder of causes of action. See "Demurrer," *infra*. And see, *Delcourt v. Whitehouse*, 92 Me. 254.

Thus, it is seen that a demurrer will lie for want of jurisdiction—as well as in any other case—only when such defect appears on the face of the complaint. *Delaware Tp. v. Board*, etc., 26 Ind. App. 97; *Gurney v. G. T. R. of Canada*, 37 N. Y. St. 557. If any of the defects enumerated in the above section do not appear on the face of the complaint the objection is to be taken by answer. N. Y. C. C. P. 498. In some States the defect of want of jurisdiction may be pleaded in the answer along with a plea to the merits, the defect of want of jurisdiction to be disposed of first. *Wells v. Patton*, 50 Kan. 732; *Christian v. Williams*, 35 Mo. App. 297. In *Wells v. Patton*, *supra*, the court said that "if the question of jurisdiction can be raised by motion or plea in abatement, that should be done. But if a fraudulent use of the process of the court, and its abuse can only be ascertained upon an answer fully setting forth the facts, the court would have ample power to settle the question of jurisdiction upon a trial before a jury, prior to the proceeding to try the other issues of the case." And see *Hamburger v. Baker*, 35 Hun 455].

(f) Lawes' Pl. 108; Com. Dig. *Abatement*, C. I. 3, 4; Tidd, 589; 3 Ld. Ray. 183; Bac. Abr. *Abatement*, O.

part, of the writ, or matter in demand. (g) For such pleading would be not only double, but incongruous: since the plea, which is *subsequent* to the other in the order of pleading, would be, as will presently appear, a *waiver* of the other. (h)

But the defendant may plead, at the same time, two different dilatory pleas, either of the same class, or of different classes, to *different* points—as different parts of the matter in demand. (i) For as the pleas go to *different* points, they do not constitute *duplicity*; and for the same reason, they are not *incongruous*, even if they are of different classes, unless one of them has before been waived. The defendant, therefore, may plead simultaneously the nonjoinder or misjoinder of a party, as *plaintiff*, to one count; and the nonjoinder of another person, as *defendant*, or other matter of abatement, to the other.

He may also, at the same time, plead a *dilatory* plea as to part of the matter in demand, and in *bar*, as to the residue: as nonjoinder of a party, to one of two counts in *assumpsit*, and *non assumpsit*, or a special plea in bar to the other (j): different pleas to different counts being virtually, as they appear upon the record, pleas to different *demands*, or causes of action. (k)

The *order* to be observed, in pleading the several dilatory pleas before enumerated, is the same as that in which they are named in the enumeration; and this order is dictated by the principle, that the pleading of any one of the pleas, in that enumeration, is a tacit *waiver* of those of the preceding class or classes. Thus, a plea of the second class waives

(g) Com. Dig. *Abatement*, C. 1. 3; Lawes' Pl. 108; Co. Litt. 303 a.

(h) Incongruousness seems no objection, in New York; and such statements waive nothing.

(i) Com. Dig. *Abatement*, I. 5; Lawes' Pl. 107.

(j) Lawes' Pl. 107-8; 2 Bos. & P. 420. *Vide* 10 Mod. 235.

(k) In the States of Connecticut and Massachusetts, it has heretofore been customary to assign any number of causes of abatement in one and the same plea. (Story's Pl. 59-60.)

those of the first; one of the third class waives those of the first and second; and the same principle prevails through the whole series.

But as the only object of the foregoing minute division, and subdivision of dilatory pleas, is to show their *priorities in the order of pleading*; and as these priorities, and the several offices of dilatory pleas, may be sufficiently explained, under the *threefold* division, heretofore mentioned, the latter as being the more simple, will be still pursued.

Dilatory pleas then, according to the division under which they are now to be considered, and have already been classed, in a former part of this Treatise, are:

- I. Pleas to the *jurisdiction of the court*;
- II. Pleas to the *disability of the plaintiff*;
- III. Pleas *in abatement*.⁽¹⁾

It is here to be observed, that what are termed pleas, *in abatement*, in this threefold division of dilatory pleas, comprehend all those which, in the more minute division, follow pleas *to the person of the plaintiff*. All dilatory pleas, therefore, which go to the disability of the person of the *defendant*, and all those which follow that class of pleas, in the latter division, are here to be considered as pleas *in abatement*, properly so called. But pleas founded upon a defendant's *privilege*, exempting him from suits, except in a *particular* court, are here considered as pleas to the *jurisdiction of the court*.

Dilatory pleas having been formerly used for the mere purpose of *delay*, and without any foundation in fact; it is enacted, by the statute 4 Ann c. 16, § 11, that no plea of this class shall be received without *affidavit* made of its *truth*, or of some matter, which shall induce the court to *believe* it true.^(m) But this enactment, though universal in its terms,

(1) 3 Black. Com. 301.

(m) Bac. Abr. *Pleas*, &c., B. 2; Ib. *Abatement*, O; 2 Saund. 210, e; Sayer, 293; 3 Wils. 51.

is applicable only to pleas alleging *extrinsic* matters: as those appearing upon the face of the record, can require no proof. (n)

(n) 3 Bos. & P. 397; 2 Ld. Ray. 1409; 1 Chitt. Pl. 452.

In New York a demurrer never need be verified; but an *answer* must be, if the complaint be. But our demurrer, though nominally reaching many causes that can hardly appear on the face of the complaint, is confined to such causes as *do* there appear; and so comes within the reason, in the text, for not requiring a verification. But as, by § [498] of the Code, an *answer* may set up the *facts* which do *not* so appear, and then take the objection;—the verification will be there required, if the complaint be verified;—otherwise, not.

CHAPTER II.

OF PLEAS TO THE JURISDICTION.

A plea to the *jurisdiction* is one which denies that the court has jurisdiction of the cause.(a)

This is the *first* plea, in the regular order of pleading, on the part of the defendant.(b) The defendant therefore, if he would except to the jurisdiction of the court, in any case in which the exception must be taken, if taken at all, by *plea*, must do it before he offers any other plea: for in such a case, a plea of any kind, which refers to the court any *other* question than that of its own jurisdiction, (which last every court must, from the necessity of the case, decide for itself, in the first instance), is a tacit admission that the court has a right to judge in the cause; or in other words, that it *has jurisdiction*: and thus all exception to the jurisdiction is waived.(c)

(a) Bac. Abr. *Pleas*, &c., E. 1, 2. ' [This is a dilatory plea, and sometimes it is held to be embraced within the term plea in abatement as used in rules of court and books of practice. *National Fraternity v. Circuit Judge*, 127 Mich. 186].

(b) Bac. Abr. *Pleas*, &c., A. E. 1, 2; Co. Litt. 303; [*Lyman v. Cent. Vt. R. Co.*, 59 Vt. 167].

(c) Id; Co. Litt. 127. b; Hob. 164; *Carlisle v. Weston*, 21 Pick. 537. [*Polhemus v. Holland Trust Co.*, 61 N. J. Eq. 654; *Carpenter v. Minter*, 65 Barb. 293; *Lyman v. Cent. Vt. R. Co.*, 59 Vt. 167; *Gause v. City of Clarksville*, 1 Fed. 353. This is so though objection has been made to the jurisdiction; as where defendant asks for a continuance to answer. *Yale v. Edgerton*, 11 Minn. 271: And see, *Luco v. Superior Court*, 71 Cal. 555; *Ft. Worth, etc. R. Co. v. Harlan*, (Tex.) 62 S. W. 971.

In New York the objection to the jurisdiction of the court is not waived by failure to take it in demurrer or answer and may be raised

In every such case also, a plea to the jurisdiction, must, for a similar reason, be pleaded, if at all, before a *general* or even a *special imparlance*.(d)

at the trial. *Le Brantz v. Campbell*, 89 App. Div. 583, construing N. Y. C. C. P. § 499].

(d) 2 Saund. 2. (n. 2.); Tidd, 418. [See *supra*, IMPARLANCE].

A motion to dismiss, not founded on matter of exception which shows want of jurisdiction in the court, comes too late after a plea to the action; and by such pleading, the party who might take such exception, if taken seasonably, must be deemed to have waived it. But where the objection is, that the court never had any authority to issue any process, or any jurisdiction over the subject or the parties, the proceeding is void. In such case, objections to the jurisdiction may be taken at any time, before or after judgment.

This distinction is founded on sound principle. If a person should issue process as a justice of the peace, who was never appointed, or was, for any cause, incapable of exercising any judicial function over the persons or the subject, it would be clearly void. No amendment, no correction of any kind which could be made, could make it good. It is *coram non judice*, and the appearance of the defendant could not confer jurisdiction. *Simonds v. Parker*, 1 Met. 508, 512; *Elder v. Dwight Manufacturing Co.* 4 Gray, 201, 204. Where it was held that a motion to dismiss could not be made after the first term, or after the pleading to the merits, an objection to the original jurisdiction was considered an exception. *Simonds v. Parker*, 1 Met. 508.

After a plea in bar the defendant cannot plead to the jurisdiction of the court; for by pleading in bar he submits to the jurisdiction. If, pursuant to leave, he files a plea to the jurisdiction, his former plea to the merits is thereby withdrawn. *Hern v. Huidekoper*, 103 U. S. 485, 494.

An objection to jurisdiction upon the ground of *citizenship*, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late. It cannot be raised at the trial upon the merits. *Smith v. Kernochen*, 7 How. 216; *De Sobry v. Nicholson*, 3 Wall. 420. If a plea in abatement be filed with the general issue, the latter waives the former. *Bailey v. Dozier*, 6 How. 30; *Sheppard v. Graves*, 14 id. 505. Where a plea in abatement is relied upon, the burden of proof rests upon the defendant. *Sheppard v. Graves*, 14 How. 505, 512. In equity, the defense must be presented by plea or demurrer, and not by answer. *Livingston v. Story*, 11 Peters, 351.

The question how far a defendant can avail himself of want of jurisdiction in the court, without raising that defense by means of a special plea, has been left in an unsatisfactory state by the case

Want of jurisdiction may arise, at common law, from either of several causes—as:

of *Spooner v. Juddow*, 6 Moore P. C. 257. There the Judicial Committee of the Privy Council decided, that when the facts ousting the jurisdiction are brought by the plaintiff himself to the notice of the court, the mere omission of the defendant to plead specially will not give the court jurisdiction over the suit, but it will be bound, whatever be the nature of the issues raised, either to nonsuit the plaintiff, or to direct a verdict for the defendant. The court, however, declined to state what would be the law, if the plaintiff were to close his case without betraying the want of jurisdiction, and the defendants were then, without any special plea raising the point, to offer evidence of facts with a view of showing that the cause of action was *ultra vires*. 1 Taylor Ev. 8th ed. § 310.

It is a maxim, that *consent* cannot give the court jurisdiction. *Jordan v. Dennis*, 7 Met. 590; *Lawrence v. Wilcock*, 11 A. & E. 941.

This is true, where the maxim is properly applicable, as where a suit is brought in a court having no jurisdiction of the subject-matter, as in case of a real action, local in its nature, out of the county where the estate lies, or a bill in equity in a court of common law, or the proof of a will in a court of common law. But when a court is one of general jurisdiction, and has jurisdiction of the subject, and a party is summoned, though irregularly, if he does not object to the irregularity in the proper stage, but pleads, answers, or enters a general appearance, he waives the objection, and, in a certain sense, therefore, does give jurisdiction by consent, that is, jurisdiction of the person. *Brown v. Webber*, 6 Cush. 563, 564.

Where a writ is served, returned, and entered by the plaintiff, the defendant has a right to appear to save his own rights, and avoid even an erroneous judgment against him; and if he does appear, and contest the jurisdiction, a mistake in the return day of a writ may be amended by leave of court, after the special appearance of the defendant to plead to the jurisdiction, *Hamilton v. Ingraham*, 121 Mass. 562; the court must hear the parties, and adjudicate on the question whether it has jurisdiction or not; "Where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or of fact," 17 Q. B. D. 602; and if it is decided there, or upon an appeal, which the losing party has a right to take, that the original court had no jurisdiction, then the defendant is the prevailing party, and is entitled to costs. *Hunt v. Hanover*, 8 Met. 343; *Elder v. Dwight Manufacturing Co.* 4 Gray, 201, 205.

There are "three circumstances any one of which will give jurisdiction to the tribunals of the country to take cognizance of the

1. From what may properly be termed *privilege of tenure*, under which head falls the plea of *ancient demesne*;

2. From some *privilege of the defendant*, by which he is exempted from liability to suits, in the court in which the action is brought;

3. From the cause of action's having arisen *out of the limits* of the court's jurisdiction;

4. From a want of power in the court to take cognizance of the subject-matter of the suit.

1. When land, sued for in any of the superior courts, (as the King's Bench, Common Pleas, &c.) is held in *ancient demesne*, the defendant may plead that fact, to the jurisdiction of the court (*e*): *ancient demesne* being a peculiar and privileged species of tenure, cognizable only in the court of *the manor*, of which the land so held is parcel. (*f*)

This plea is unknown to the laws of any of the United States.

2. If an *attorney*, or other *officer* of one of the superior courts of Westminster, was sued *alone*, and in his own individual capacity, in another court, in any action that the court of which he was an officer was *competent to try*; he could defeat the suit, by pleading his privilege, as an officer of the court to which he belonged. (*g*) This privilege was allowed, on the presumption that the constant attendance of these officers, in *their own courts*, was necessary to the due administration

matter. The first is, where the domicile of the defendant is within the jurisdiction of the court. The second is, where the subject-matter in dispute is situated within the jurisdiction of the court. And the third is, where the contract in question was entered into within the jurisdiction of the court. By the word 'jurisdiction' is meant territorial jurisdiction, the topographical limits within which the compulsory process of the court operates." *Cookney v. Anderson*, 31 Beav. 462, 1 DeGlx, J. & S. 365.

(*e*) Com. Dig. *Abatement*, D. 1; 2 Leon. 190; Sty. 273; 3 Lev. 182.

(*f*) 2 Black. Com. 93; 3 Woodes 12.

(*g*) Com. Dig. *Abatement*, E. 4; 2 Bulstr. 207; 2 Salk. 544; Andr. 44; Bac. Abr. *Abatement*, C.

of justice.—But as this privilege does not exist in any of the United States, the more particular rules relating to it are here omitted.

3. It is in some cases, a good plea to the jurisdiction, that the cause of action *arose out of the local limits* of the court's jurisdiction; in others it is not so. And on this head the following distinctions are to be observed:

a. In courts of *limited* jurisdiction,—i. e. courts whose jurisdiction extends only to causes of action actually arising within certain local limits—it is a good plea to the jurisdiction, as well in *transitory* as in *local* actions, that the cause of action did not accrue within those limits. (*h*) Most of the *city courts*, in the United States, are believed to be thus limited in their jurisdiction.

In such cases, however, it is not necessary for the defendant to *plead* to the jurisdiction: since the exception may be taken under the *general issue*. (*i*) For the legal presumption being *against* the jurisdiction of such inferior courts; it is necessary for him, who sues in one of them, to *allege* that the cause of action arose within its jurisdiction. If this allegation is omitted, his declaration is ill; and if the allegation being made, is not *proved*, he is liable to a nonsuit. (*j*)

b. Courts of *general* jurisdiction, (as the Superior Courts of Westminster, in England), have cognizance of all *transitory* actions, wherever the cause of action may have accrued: since all such actions in general, follow the *person* of the defend-

(*h*) Bac. Abr. *Pleas*, &c., E. 1; Gilb. H. C. P. 188-9; 1 Roll. Ab. 545-6; Bac. Abr. *Courts*, D. 4.

(*i*) Bac. Abr. *Pleas*, &c., E. 1; 1 Lill. Ab. 366; 1 Saund. 98, (n. 1); Gilb. H. C. P. 188-9; 2 Ves. 357; 6 East, 601.

(*j*) 2 Inst. 231; 1 Roll. Ab. 545-6; Bac. Abr. *Pleas*, &c., E. 1; Gilb. H. C. R. 188-9.

There seems no reason, why, if a complaint in one of these inferior courts does not *show its jurisdiction*, it is not good cause for a demurrer, under § [488] of the New York Code Civ. Proc; it certainly is within the *principle* of the text.

ant. (*k*) The same extent of jurisdiction appertains not only to the several Superior Courts, (or highest courts of ordinary jurisdiction), of the several States, which compose the United States; but to various other courts, of subordinate authority, in many of the States, and probably in all of them.

c. But it is a good exception to the jurisdiction of courts, even of the superior class, that the cause of action, when *local*, accrued in a *foreign* State, or in any place where the process of the court cannot run. (*l*)

Thus, to an action of trespass *quare clausum fregit*—or an action for rent arrear, against the *assignee* of a lease—or any other action, in general, arising out of the *reality*, it is a good plea to the jurisdiction of a court, even of general jurisdiction, that the land, on which the wrong was committed, or out of which the action arose, lies in a foreign country or State. (*m*) And the same rule extends to *all local* actions, in general, the causes of which arose in a foreign State. (*n*) In the application of this rule, in the United States, the several States are, in relation to each other, *foreign*.

In an action brought for the recovery of a *local subject*, (as land), situated in a foreign country, or beyond the reach of the process of the court, a *plea* to the jurisdiction cannot, however on principle, be necessary for the purpose of ousting the jurisdiction. For as the judgment, demanded in such an action, being *in rem*, would, if rendered be utterly nugatory (since the subject could not be reached by any process of the

(*k*) Com. Dig. *Action*, N. 7; Cowp. 161, 177–8, 344; 2 H. Black. 145–161; 5 T. R. 616; 7 Ib. 243.

(*l*) Bac. Abr. *Pleas*, &c., El. 1; Ib. *Actions Local*, &c., A. 1; 2 Bl. Rep. 1070; 4 T. R. 503; 7 Ib. 587; 1 Stra. 646.

(*m*) Com. Dig. *Abatement*, D. 3; 1 Salk. 80; 1 Show. 191; Carth. 182.

(*n*) For the enumeration and description of *local actions*, in general, see *ante*, VENUE.

court); the exception may be taken in any stage of the proceedings.(o)

But in *local* actions which are *personal*, and in which of course, the judgment demanded may be enforced against the *person or goods* of the defendant (as in trespass *quare clausum fregit*, debt for rent against the *assignee* of a term, &c.)—if the cause of action accrued in a foreign state, or where the process of the court cannot run, it appears to have been formerly deemed necessary, in a Superior Court, to *plead* to the jurisdiction.(p)

It seems now, however, that where a local action, not requiring a judgment *in rem*, (as trespass *quare clausum fregit*, for an injury to land lying in a foreign country), is brought, even in a Superior Court, exception may be taken to the jurisdiction, under the *general issue*.(q)

d. It is a fatal objection to the jurisdiction of any court, that it has not cognizance of the subject-matter of the suit—i. e. that the *nature* of the action is such as the court is, under no circumstances, competent to try.(r) As if a *real* action were brought in B. R.: or a cause, exclusively of *admiralty* jurisdiction, in any court of common law. In any such case,

(o) Cowp. 176; 7 T. R. 587-8; 1 Chitt. Pl. 284.

See *ante*, that where a court of *equity* gets jurisdiction of the *person*, it will make a decision *in rem*;—although the *subject* be situated in a *foreign* state. (3 Kern. 591.) But the *suit*,—though now in the *Supreme Court*,—(which is a court of *law*, as well as of equity,) must still be an *equitable* one; i. e. must ask such *relief* as *only* a court of equity can give; or the rule in the text governs.

(p) 1 Salk. 80; 1 Show. 191; Carth. 182; Com. Dig. *Abatement*, D. 3.

This was the rule, in relation to *this* class of local actions, in the courts of Westminster, when the cause of action accrued in *Wales*, or in a *County Palatine*, where though, within the kingdom of England, the ordinary process of these courts did not run. Bac. Abr. *Pleas*, &c., E. 1; 1 Chitt. Pl. 427; Cowp. 172; Andr. 198.

(q) 4 T. R. 503. And vide. 6 East, 583, 598-9; 7 T. R. 587.

(r) 10 Co. 68. 76. b; 1 Vent. 133-4; Hardr. 478, 481; 8 Mass. 87; 12 Ib. 367.

neither a plea to the jurisdiction, nor any other *plea* would be *necessary*, to oust the jurisdiction of the court. The cause might be dismissed on motion; and even without motion, it would be the duty of the court to dismiss it *ex officio*. For the whole proceeding would be *coram non judice*, and utterly *void*.

As to the *mode of pleading* to the jurisdiction there is an essential difference to be observed, between a plea to the jurisdiction, in a court of *limited*, and one of *general* jurisdiction: in a court of the former class, it is sufficient to plead *negatively*—i. e. to show, by proper allegations, that the court has *not* jurisdiction: whereas in a *superior* court it is necessary, both at law, and in equity, and as well in criminal as in civil cases, not only to show that the court has *not* jurisdiction; but also to point out, specially, some *other court* which has it.(s) For if it does not appear that a remedy can be had in some other tribunal; that very fact will, in general, confer jurisdiction upon a superior court; as there would otherwise be, for aught that would appear, a failure of justice. But it seems manifest, for reasons which have already been stated, that neither in this, nor in any other way, can jurisdiction be ultimately given to any court, which has not cognizance of the *subject-matter*; as where the action is brought for the recovery of *real* property, lying in a *foreign* country, or where the process of the court cannot run.

A plea to the jurisdiction must be signed by the defend-

(s) Yelv. 13; 1 Ves. 202; 2 Ib. 357; 2 Burr. 1047; Cowp. 172; Doct. Pl. 234; 6 East, 583, 598, 601; *Rea v. Hayden*, 3 Mass. 26; [*Kahn v. So. Bldg. Assn.*, 115 Ga. 459; *Ridling v. Stewart*, 77 Ga. 539; *Heyman v. Covell*, 36 Mich. 157; *Guaranty Company v. National Bank*, 95 Va. 480.

The presumption being that superior courts of general jurisdiction are properly exercising their jurisdiction, when the defendant objects he should state facts positively showing no jurisdiction in any event. *Diblee v. Davison*, 25 Ill. 486; *Perkins v. Hayward*, 132 Ind. 95; *People v. Hall*, 169 N. Y. 184; *Kenny & Downer v. Howard*, 67 Vt. 375].

ant *in person*. For if signed by an attorney, who is an officer of the court, he is supposed to have signed it by *leave* of the court; and the asking of leave is considered as a tacit *admission* of the jurisdiction.(*t*) But such an implied admission obviously cannot aid the jurisdiction, except in cases, in which the objection to the jurisdiction must be taken, if at all by *plea* to the jurisdiction, and can be taken in *no other* way.

In *ejectment*, according to the English practice, a plea to the jurisdiction cannot be pleaded, except by *leave of court*(*u*): because without such leave, the real defendant is, by the "common rule," obliged to plead the *general issue*.—Under the more simple forms of this action, which prevail in some of the United States, no such leave is necessary.

A plea to the jurisdiction, concludes to the *cognizance* of the court, by praying judgment, if the court will take "cognizance, (or have further cognizance)," of the suit—or in more technical language, "of the plea aforesaid."(*v*)

Whenever jurisdiction cannot be *given* to the court, by the defendant's omitting to plead to the jurisdiction, or by consent of parties, the *plaintiff* in the suit may assign for error the want of jurisdiction; although he, himself, chose to resort to the court for redress.(*w*) For in such a case, nothing can give validity to the judgment.(*x*)

(*t*) Bac. Abr. *Abatement*, A. Ib. *Pleas, &c.*, E. 2; 6 Mod. 146; Lawes' Pl. 91; 6 Pick. 371; [*Kenny & Downer v. Howard*, 67 Vt. 380].

(*u*) 1 Black. Rep. 197; 2 Burr. 1046; 3 Wils. 51; 8 T. R. 474.

(*v*) Bac. Abr. *Pleas, &c.*, E. 1; 3 Black. Com. 303; 1 Wentw. Pl. 19; 2 Chitt. Pl. 412; 3 T. R. 186; 5 Mod. 146; Lawes' Pl. 109; [*Fields v. Walker*, 23 Ala. 155].

(*w*) 2 Cranch, 126.

(*x*) [Where, however, a court has no jurisdiction of the subject-matter, and the judgment is therefore a nullity—void *in toto*—objection cannot be waived and may be taken at any stage of the proceedings. *Clark v. Manufacturer's Natl. Bank*, 74 Conn. 263; *Demilly v. Grosrenaud*, 201 Ill. 272; *Robinson v. Oceanic S. S. Nav. Co.*, 112 N. Y. 315. In such a case it is the duty of the court to act whenever, or however, the defect is brought to its attention. *Chipman v. Waterbury*, 59 Conn. 496; *Burgess v. Burgess*, 71 N. H. 293].

CHAPTER III.

OF PLEAS TO THE DISABILITY OF THE PLAINTIFF.

There are certain *legal disabilities*, which disqualify the subjects of them to prosecute suits; and which are therefore pleadable "to their disability" as plaintiffs. Some of these entirely defeat the suit; while others only *suspend* it, *quousque*—until the disability be removed.

These disabilities, as they exist in the law of England, are Outlawry, Attainder of treason or felony, Præmunire, Excommunication, Alienage, Coverture, Infancy, and that there never was such a person.

OUTLAWRY.—That the plaintiff is an *outlaw*, is pleadable to his disability: one of the effects of a judgment of outlawry being, to disable the outlaw to assert any civil right in a court of justice, while that judgment remains in force.(a)

If the disability existed, when the *cause of action accrued*; it has the effect of *totally defeating* the suit (b); which, in such a case, was improper in its commencement. But the disability, when it commences *after* the accruing of the cause of action, is only a *temporary* impediment, which does not absolutely *destroy* the suit. For as the action in this case is *rightly commenced*; the supervening disability has no other

(a) Bac. Abr. *Abatement*, B; Litt. § 197; Co. Litt. 128, a. See Appendix.

As this disability, and those which follow it, to that of *excommunication*, inclusive, can be of little practical importance in the United States; little more concerning these, than a mere enumeration of them, will be presented in this Treatise.

(b) Lawes' Pl. 102-3.

effect, than that of *suspending* the proceedings in it, until the impediment is removed; and this can be done, only by a *reversal* of the judgment of outlawry, or a *pardon*.(c)

ALIENAGE is, in some actions, pleadable to the disability of the plaintiff; but not in all. In regard to the extent of this disability, there exists a distinction, first, between alien *enemies* and aliens in *amity*; and secondly, between the *species of actions*, which the latter can, and cannot, maintain.

An alien *enemy* can in general maintain, in his own right *no* action; real, personal or mixed. This rule extends, as well to *prisoners of war* detained here, as to all other subjects of a hostile power.(d) For, as a general rule, such an alien, being out of the protection of the laws of the State, with which his own is at war, can have no civil remedies under them.

This rule, however, does not extend to an alien enemy residing here, under a *license protection* or *safe conduct*, from the executive government.(e) For such license, &c., places him under the protection of the law, and substantially upon the same footing as that of an alien *friend*.

The question whether an alien enemy, not thus protected by the government, can maintain suits in the character of *executor* or *administrator*, has been a subject of considerable debate, and diversity of opinion.(f) The better opinion appears to be, that he cannot.(g) For, without adverting to the several reasons, urged in the books, on either side of the question, it may be sufficient to observe, that his right to sue here, in any capacity, would seem of course to give him the

(c) Bac. Abr. *Abatement*, B. 1; Lawes' Pl. 103; 12 Mod. 400.

(d) Bac. Abr. *Abatement*, B. 3; *Aliens*, D, 2 Stra. 1082; 6 T. R. 23, 49; 8 Ib. 166; 4 East, 502.

(e) Bac. Abr. *Abatement*, B. 3; *Aliens*, D; 1 Salk. 46; 4 Mod. 405; 1 Ld. Ray. 282; 2 Stra. 1082; 8 T. R. 166; 10 Johns. 69.

(f) Cro. Eliz. 142, 684; Skin. 370; Carter, 193; Bac. Abr. *Aliens*, D; *Executors, &c.*, A. 4.

(g) Co. Litt. 129. b; 1 Salk. 46; 1 Ld. Ray. 282; Toll. on Ex'rs. 32.

additional right, not only of holding such *personal intercourse and communication* with his counsel and others here, as the policy of the laws of war forbids, between the subjects of belligerent states; but also of *appearing personally* in the court, in which his action is brought, and of remaining, during its pendency, within the territories of the state at war with his own: a right which no alien enemy, not protected by the government of the State with which his own is at war, can possess.

"*Alien enemy*" may be pleaded, as well in *bar*, as to the plaintiff's disability. *(h)* For the law recognizes, in such alien, no *right of action* during the war.

Under the plea, that the plaintiff is an alien enemy, the burden of proof is on the *defendant*. *(i)* For every suitor is presumed to be under the protection of the law, and of ability to maintain his suit, until the contrary is shown. Hence the plea must allege, not only that the plaintiff is an alien enemy: but also, that he has no *license, safe-conduct, or protection*, from the government of the Kingdom or State, in which the suit is brought *(j)*: an example of the highest degree of certainty required in pleading.

An *alien-friend*, being under the protection of the law, may in general maintain actions of any kind, either in his individual or representative character; except in so far as his legal incapacity to hold certain species of property disables him to sue for the recovery of it, or for damage done to it.

He may, therefore, maintain actions for the recovery of *debts*—for injuries to his *person*—and in general, actions of

(h) Bac. Abr. *Abatement*, B. 3; *Attens*, E; Co. Litt. 129; 6 T. R. 24; 4 East, 407, 410; Com. Dig. *Abatement*, K; 1 Bos. & P. 222, (n. a.); 2 Ib. 72; 2 Chitt. Pl. 425-6; 1 Ib. 470, 473; 3 Inst. Cler. 16; for a form of this plea, see *Alcinous v. Nigreu*, 4 El. & B. 217. *Vide* 10 Johns. 183; 11 Mass. 26. 119.

(i) 2 Stra. 1082. *Vide* also 8 T. R. 166; 4 Mod. 405.

(j) 8 T. R. 166; 4 Mod. 405; 3 Inst. Cler. 16; 2 Chitt. Pl. 425-6. *Vide* 2 Gallison, 127-129; *semb. cont.*

any kind relating to personal chattels. (*k*) In these several cases, therefore, alienage is no disability. (*l*)

In *real* and mixed actions, however, alienage is held a good plea to the disability of the plaintiff, even though he be an alien-friend. (*m*) For in both these action, *real* property is recovered; and as no alien can, it is said, *hold* such property, it follows that he cannot *recover* it by suit. (*n*)

But this rule seems to require some qualification. For though no alien can *inherit* real estate; an alien-friend can, nevertheless, take it by *purchase*, and, as a purchaser, hold it against all others than the *King* or *State*—and even against these, until *office-found*. (*o*) It would seem, therefore, that until office-found, he may sue for and recover it; and so it has been held, in this country. (*p*)

(*k*) Cowp. 171; 3 Black. Com. 384; 2 H. Black. 162; Yelv. 198; Bac. Abr. *Aliens*, D; Co. Litt. 129. b; 2 Kent's Com. 54.

(*l*) In New York by statute, an alien, 'being an *inhabitant* of this State,' can be an executor; and, of course, can maintain suits, as such executor.

(*m*) Bac. Abr. *Abatement*, B. 3; *Aliens*, D; Co. Litt. 129. b.

(*n*) The common law rule, disabling aliens to hold real property against the *Sovereign*, or *State*, has been adopted to its full extent in most of the United States. In some of them, however, the rule has been somewhat relaxed. And *private statutes* enabling foreigners to hold lands, like native citizens, are sometimes passed by our State Legislatures. This is usually done indeed, as a matter of course, in favor of *femes covert*, who are foreigners, on a prayer that they may be enabled to hold *dower* in the inheritable estates of their American husbands.

(*o*) Co. Litt. 2. b; 5 Co. 52; 9 Ib. 141; Pow. Dev. 316; 4 T. R. 300; 4 Cruise's Dig. 22; Esp. Dig. 439; 3 Dallas, 305-6, n; 1 Mass. 256; 12 Ib. 143; 7 Cranch, 603; 2 Kent's Com. 53.

By 'office-found,' is here meant, a certain species of *inquisition* or *verdict*, finding a person to be an alien; upon which finding, the estate purchased by him vests in the Crown or State.

(*p*) *Bachelor v. Bachelor*, 1 Mass. 256; 7 Cranch, 603.

According to the terms of the statute of Connecticut, on this subject, no alien is capable of '*purchasing* or holding' land in the state. Probably, however, nothing more than an affirmation of the common law rule was intended by this enactment.

In ejectment, also, brought by an alien-*friend* in *his own right*, his alienage is regularly pleadable to his disability, as in real and mixed actions; because he cannot, in general, hold even a term for years, in his own right. (*q*)

But to this rule there is one exception: an alien-*friend*, being a *merchant*, may hold, in his own right, a term for years, in a house or building, for the convenience of merchandizing. (*r*) This exception is allowed, for the encouragement of trade and commerce. And as an alien-*friend* may, in the capacity of *executor* or *administrator*, hold a term for years, in the right of others, who are not aliens; he is of course capable, in either of those capacities of suing for the recovery of it. (*s*)

COVERTURE. When a *feme* covert sues, otherwise than as co-plaintiff with her husband, her coverture is generally pleadable to her disability. (*t*) The principal reason of her in-

In New York by statute, a *devise* to an alien, of *any interest* in real property, is *void*. (3 Rev. St. 5th Ed. p. 139, § 4.) The construction of these provisions has, however, been *very liberal*;—making an alien's title to land conveyed or devised to him good, *except as against the people*. *Wright v. Saddler*, 20 N. Y. 320. [*Matter of McGraw*, 111 N. Y. 66, 96; *Hall v. Hall*, 81 N. Y. 130].—The widow of an alien is, however, entitled to *dower*; and that, whether *she* be an alien, or not: and an *alien*, being widow of a *citizen*, is entitled to *dower*, and may take by devise. 3 Rev. St. 5th Ed. pp. 7, 8, §§ 34, 35, 39, 40.

[For present statutory provisions in New York, see, Real Property Law (3 Birdseye's Rev. Stat.) §§ 4 *et seq.* and Law of Wills (3 Birdseye's Rev. Stat. 4018)].

(*q*) Poph. 35; Co. Litt. 2 b; Bac. Abr. *Aliens*, C; 2 Black Com. 297; 1 Roll. Ab. 194.

(*r*) *Id.*

(*s*) Cro. Car. 8. Bac. Abr. *Aliens*, D.

(*t*) Com. Dig. *Abatement*, E. 6; Bac. Abr. *Abatement*, G; Co. Litt. 132; 3 T. R. 631.

Generally the rule of common law is, that a wife cannot, during coverture, save in a few excepted cases, sue or be sued alone; it is necessary that her husband should be joined in the action, and if the husband wishes to maintain an action *on contracts* made by his wife before marriage, or on contracts made by her as an administra-

ability to sue alone, appears to be, that if she were permitted thus to sue, the result of the suit might impair both the prop-

trix, he is obliged to join her as a co-plaintiff; but he can sue either alone or jointly with his wife on negotiable instruments given her before marriage, on rights acquired by her after marriage, and on contracts made with himself and his wife after marriage. A count which alleges a joint contract by husband and wife with a third person is bad on demurrer, because it alleges a contract which cannot legally exist. *Tobey v. Smith*, 15 Gray, 535.

For causes of action arising out of injuries to the person or property of the wife committed before or during marriage, and for injuries for which the wife has to sue in a representative character, the husband and wife are obliged to sue jointly. *Macqueen Husband and Wife*, 3d ed. 374.

The common law, as to the disabilities of married women, was not founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control; nor was it subject to exception whenever there might be circumstances sufficient to repel such a presumption. The principle of the disability of coverture was that stated by Littleton (§ 168): "A man and his wife are but one person in the law;" which is the reason why "a man cannot grant or give his tenements to his wife during the coverture;" and (as Lord Coke says, in his comment on the same place) "she is disabled to contract with any, without the consent of her husband; *omnia quæ sunt uxoris sunt ipsius viro*." As to her personal property in possession the husband had absolute power without any concurrence on her part, and also as to the administration and usufruct of her real estate. By personal contracts either with him or with any other person, she could in no way bind herself.

Although a married woman could not contract or convey property (not separate) except so far as by common or statute law she was enabled to join with her husband in doing so, she might always, when her interest required it, sue and be sued, jointly with her husband, or (in equity) apart from her husband by a next friend. Lord Selborne, L. C., in *Cahill v. Cahill*, 8 App. Cas. 425, 426; *Phillips v. Barnett*, 1 Q. B. D. 438, 439; *Butler v. Butler* 14 id. 831.

The separation of husband and wife, except under a judicial separation, makes no difference with respect to the joinder of husband and wife as parties to actions. *Head v. Briscoe*, 5 C. & P. 484. Upon a divorce *a vinculo matrimonii*, the disability of the wife to sue or be sued alone ceases, and the husband ceases to be liable for wrongs previously committed by her. *Capel v. Powell*, 17 C. B. N. S. 743.

A case of first impression recently arose in the Queen's Bench

erty of the *husband* and his marital rights: since both might be put in hazard, by a judgment against her.

Division. The question was, whether a wife, after being divorced from her husband, can sue him for an assault committed upon her during coverture. And it was determined that she could not. The ground of the decision was, not the technical one of parties, a mere difficulty in the procedure, but the general principle of the common law, that being one person, one cannot sue the other. *Phillips v. Barnet*, 1 Q. B. D. 436. In an old case the court says: "As this was a provision by a husband for his wife, we should be glad, if possible, to get over the maxim in law, that a husband and wife are one person. * * * We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." Judgment was given in that case for the defendant *reluctante totâ curiâ*. *Firebress v. Pennant*, 2 Wils. at p. 255, quoted by Field, J., in *Phillips v. Barnet*, 1 Q. B. D. 441.

Contracts.—In actions brought on promises made to the wife before marriage, the husband and wife ought to sue jointly. If the wife sues alone, the action may be met by a plea in abatement; but no other objection can be taken by the defendant. *Milner v. Milnes*, 3 T. R. 627, 631; *Bendix v. Wakeman*, 12 M. & W. 97. If the husband sues alone, and the objection appears upon the record, it may be met by demurrer, or by motion in arrest of judgment, or by error; or if it transpires upon the evidence, it will be ground of nonsuit, or adverse verdict. But on a negotiable bill of exchange or promissory note, made payable to the wife before the marriage, the husband may sue alone in his own name. *McNeilage v. Holloway*, 1 B. & Ald. 218. If the husband dies before action, the right of action remains in the widow; if the wife dies before action, the right of action passes to her administrator, and the husband cannot sue except in that character. *Bullen and Leake Precedents*, 3d ed. 171.

In actions brought on promises made by the wife before marriage, the husband and wife ought to be sued jointly. *France v. White*, 1 M. & Gr. 731. If the wife is sued alone, she may plead her coverture in abatement, but cannot take the objection in any other manner. *Lovell v. Walker*, 9 M. & W. 299; *Milner v. Milnes*, 3 T. R. 627, 631. If the husband is sued alone, and the objection appears on the record, it may be raised by demurrer, or by motion in arrest of judgment, or by error; or if it transpires upon the evidence, it will be ground of nonsuit or adverse verdict. *Mitchinson v. Heuson*, 7 T. R. 348; *Richardson v. Hall*, 1 B. & B. 50. If the husband dies be-

But if the husband has *abjured the realm*, or is *banished*, or is, from any cause, *civilly dead*; this disability of the wife

fore action, the right of action remains against the widow; if the wife dies before action, the right of action lies only against her administrator. Bullen and Leake Precedents, 3d ed. 171.

Where a promise is made to a married woman on a consideration proceeding from her solely, as a contract with her to pay for her services rendered,—wherever, as it is said, the wife is the meritorious cause of action, the husband may, at his election, sue alone in his own name or jointly in the name of himself and wife; or the wife may sue alone, subject to the non-joinder of the husband being pleaded in abatement. *Bidgood v. Way*, 2 W. Bl. 1236; *Dalton v. Midland Ry. Co.*, 13 C. B. 474.

On a note made to a wife during coverture, the husband may sue alone, or the husband and wife may sue jointly. *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Howard v. Oakes*, 3 Exch. 136; *Burrough v. Moss*, 10 B. & C. 558; *Sutton v. Warren*, 10 Met. 451.

When a married woman is sued alone upon a contract made by her before marriage she can plead her coverture in abatement only; when she is sued alone upon a contract made during coverture she may plead her coverture in abatement or in bar. If a married woman sues alone in an action in which she might join with her husband, her coverture can only be pleaded in abatement, if the action is one in which she could not join with her husband, her coverture may be pleaded either in abatement or in bar. Bullen and Leake Precedents, 3d ed. 598.

Torts.—With respect to injuries to the person, or to the personal or real estate of the wife, committed before the marriage, the husband and wife must join in suing; the husband cannot sue alone. If the wife sue alone, the defect can be taken advantage of only by a plea in abatement. *Milner v. Milnes*, 3 T. R. 627, 631.

With respect to injuries to the person of the wife during coverture, the husband and wife must join in suing. The husband cannot sue alone for damages in respect of the injury to the wife; but may sue alone for the damages occasioned thereby to himself solely. If the wife sues alone, it is only matter for a plea in abatement.

In an action of tort for injury to a married woman during coverture, what is done to her is the cause of action, and she may sue in her own name, without joining her husband, and can recover, if the defendant does not plead her coverture in abatement, for he cannot plead it in bar of the action. The injury to the wife is the meritorious cause of action, and if she had died before the commencement of the action, the husband would not have been entitled to sue. If damages should be given, they would belong in the first

ceases, and she may consequently sue alone. (u) For in such cases, the husband, though actually living, is regarded as

place to the wife alone, and if they should not be reduced into possession by the husband and he should die, the damages would be hers, and would not go to his executors. *Weldon v. Winslow*, 13 Q. B. D. 786, 787.

A wife cannot sue in respect of any injuries to personal property committed during the coverture, as all such property vests in the husband exclusively. The husband alone can sue for such injuries. *Chambers v. Donaldson*, 9 East, 471; *Baggett v. Frier*, 11 Id. 301. See *Shingler v. Holt*, 7 H. & N. 65.

With respect to injuries done during coverture to the real property of which the husband and wife are seized, or to which they are entitled in right of the wife, the husband may sue alone, or the husband and wife may join in suing. *Bidgood v. Way*, 2 W. Bl. 1236; 1 Chitt. Pl. 7th ed. 84; *Wallis v. Harrison*, 5 M. & W. 142.

Upon the bankruptcy of the husband the assignees must join with the wife in suing upon causes of action in right of the wife, which, if vested in the husband, would pass to the assignees, as for a conversion of the wife's goods before marriage; and the husband cannot join in the action. *Richbell v. Alexander*, 10 C. B. N. S. 324. Nor can the assignees sue alone. *Sherrington v. Yates*, 12 M. & W. 855.

In respect of wrongs done by the wife before the marriage, or wrongs done by the wife during coverture, the husband and wife must be jointly sued. *Vine v. Saunders*, 4 Bing. N. C. 96; *Catteral v. Kenyon*, 3 Q. B. 310. They may be jointly sued for wrongs done by them jointly. *Keyworth v. Hill*, 3 B. & Ald. 685; *Heckle v. Lurvey*, 101 Mass. 345. The wife sued alone can object only by plea in abatement.

For any wrong committed by the wife during coverture, she is liable, and her husband cannot be sued without her; neither can she be sued without joining her husband. The husband indeed is not liable for the wrong, but he is joined only by reason of the universal rule that the wife, during coverture, cannot be either a sole plaintiff or a sole defendant. 2 Wms. Notes to Saund. 123, 124.

A married woman is liable for all torts committed by her, including fraud; but when the fraud is directly connected with a contract with her, and is the means of effecting it and part of the same transaction she is, at common law, exempt from liability. Thus, an action will not lie against husband and wife for a fraudulent

(u) Bac. Abr. *Abatement*, G.; Com. Dig. *Abatement*, E. 6; Co. Litt. 132; 1 Black. Com. 469.

having *no civil rights*; and the wife is, therefore in contemplation of law, a *feme sole*.

And if a *feme sole*, being plaintiff in a suit, marries while it is *pending*; this supervenient coverture may, by the common law, be pleaded to her disability.(v) For by this act, she is disabled to proceed *further* in the suit, on the same principles, on which a prior marriage would have disabled her to sue at all.—But by a statute provision, in some states, if a *feme sole* plaintiff marries, *pendente lite*, her husband

representation by the wife that she was unmarried, whereby the plaintiffs were induced to take her promissory note. *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422. Where the wife fraudulently represented that a bill was accepted by her husband, whereby the plaintiff was induced to discount it, the court was equally divided as to the action. *Wright v. Leonard*, 11 C. B. N. S. 258.

A declaration in tort against husband and wife, alleging a conversion by them to "their" own use, is bad on demurrer; a conversion cannot, in legal contemplation, be to the use of the wife. *Tobey v. Smith*, 15 Gray, 535. Formerly this was cause for arresting judgment, or for reversing it on a writ of error. But it was decided by the Court of King's Bench in 1820 that a count thus framed was sufficient after verdict. *Keyworth v. Hill*, 3 Barn. & Ald. 685. An action of this kind may be maintained against husband and wife, when they jointly convert property (2 Wms. Saund. 6th ed. 47, n; *Newman v. Cheyney*, Latch, 126); or when the wife alone converts it; but the declaration should allege that the conversion was to the use of the husband. *Tobey v. Smith*, 15 Gray, 535. See *Catterall v. Kenyon*, 3 Q. B. 310; 2 G. & D. 545; *Estill v. Fort*, 2 Dana, 237.

A wife is liable in tort for the conversion of goods of which she obtained possession by her husband's order and in his absence. *Heckle v. Lurvey*, 101 Mass. 344. They are jointly liable for a tort done by her in his absence, but by his direction and instigation. *Handy v. Foley*, 121 Mass. 259. The statement in 2 Kent Comm. 149, that, if the wife commits a tort in his company or by his order, he alone is liable, is too general, and must be limited to the case of her acting by his coercion. *Winthrop v. Atty. Gen.*, 128 Mass. 261.

Finally, it may be observed that the effect of the recent statutes, commonly called the Married Women's Property Acts, is to destroy the disability of the wife for the purpose of procedure.

(v) 3 Black. Com. 316; Bac. Abr. *Abatement*, G.; *Wilson v. Hamilton*, 4 Serg. & R. 238; *Vinton v. Vinton*, 17 Mass. 342.

may appear, suggest the marriage upon the record, and then proceed in the suit, jointly with her.

The plaintiff's coverture is pleadable, only as a *dilatory* plea. It is no defence in bar (*w*): because the fact of her coverture goes neither in denial nor avoidance of the *cause of action*; but simply in denial of her legal ability to commence or prosecute the suit alone.

INFANCY. That the plaintiff is an infant, is pleadable to his disability, unless he appears by *guardian*, or his *prochein amie*, (next friend.) (*x*) For he cannot declare or appear

(*w*) 3 T. R. 631; Carth. 124; 7 Gray, 338, 343.

(*x*) Co. Litt. 135, b.; 2 Saund. 117, f. (n. 1.); 3 Black. Com. 301-2; Bac. Abr. *Infancy*, &c., K. 2; 7 Johns. 373; 2 Conn. 357. [See *Perkins v. Stimmel*, 114 N. Y. 359].

An infant cannot sue or appear either in person or by attorney; but must sue by *prochein ami* or by guardian, and defend by *guardian* only. A *prochein ami* is appointed by the court, and his authority is revocable by the court. *Guild v. Cranston*, 8 Cush. 506. He may sue without any authority from the infant. *Morgan v. Thorne*, 9 Dowl. 228; *Lees v. Smith*, 5 H. & N. 632. The infant has no power to prosecute or discontinue the suit during his minority. *Burnham v. Seaverns*, 101 Mass. 360, 362. An infant defendant must have a guardian *ad litem* when he has no probate guardian or other authorized guardian. *Swan v. Horton*, 14 Gray, 179. If he has a probate guardian, a guardian *ad litem* need be appointed only when the interest of the guardian and ward in the suit are conflicting. *Mansur v. Pratt*, 101 Mass. 60. The disability of an infant to sue can be taken advantage of by plea in abatement only. *Blood v. Harrington*, 8 Pick. 552; *Smith v. Carney*, 127 Mass. 179. The next friend is usually a relation, and is responsible for the propriety of the proceedings, and *prima facie*, for costs. In Massachusetts a *prochein ami*, as such, is not liable to costs. *Crandall v. Slaid*, 11 Met. 288.

The plaintiff may take issue on the plea of infancy, or may reply that the defendant ratified the promise after he became of full age; or, to so much of his claim as relates to necessities, the plaintiff may reply that they were necessities suitable to the degree and condition of the infant. Bullen and Leake Precedents, 3d ed. 604.

As a general rule, the right of the party to recover must be determined by his rights at the time the action is commenced, and the plaintiff cannot recover on a promise made after that time. Under the system of special pleading, where, in an action upon a contract,

in person, by reason of his supposed want of judgment to conduct a suit; nor by *attorney*, on account of his legal inability to make a power of attorney.

By the common law, if an infant plaintiff appears by attorney, and, (no plea to his disability being interposed),

the defendant pleads infancy, and the plaintiff relies upon a ratification after the defendant became of age, he files a replication alleging that he ought not to be barred by the plea, "because he says, that the defendant, after the making of the several promises and undertakings in the declaration mentioned, and before the commencement of this suit, to-wit, on, etc., attained his age of twenty-one years. And the plaintiff further saith that the defendant, after he had so attained his age of twenty-one years, and before the commencement of this suit, to-wit, etc., assented to, and then and there ratified and confirmed, several promises and undertakings in the declaration mentioned." *Freeman v. Nichols*, 138 Mass. 313, 314.

A superfluous allegation, prematurely made in anticipation of some matter which may be subsequently pleaded on the other side, need not be noticed by the adverse party, and is not traversable. Thus, if in debt on bond, the plaintiff should declare that, at the time of the sealing and delivery, the defendant was of full age it was held that the defendant must not *traverse* this allegation, if he purposed to set up infancy as a bar; but that he must plead *deins age*, and conclude *with an averment*. 2 Wms. Saund. 6th ed. 63 b; 2 Wms. Notes to Saund. 161, 162, citing *Sir Ralph Bovey's Case*, 1 Vent. 217.

A writ against A. "as he was the guardian of" B. is against A. personally, and the words "as he was the guardian," etc., may be rejected as surplusage. A suit on a demand against a ward must be brought against the ward, not against the guardian, and the form of writ used when a suit is brought against an administrator on a contract made by his intestate is not appropriate. In such case, the order in the writ is to attach the goods and estate which were of the intestate, in the hands, of the administrator. Such form is necessary there, because a judgment when obtained is to be paid out of the estate of the intestate, the title to which is in the administrator, not out of the administrator's own estate, and the writ must indicate whose estate is to be attached, if any. This form is not necessary in the case of a ward, because the title to the estate remains in him, and does not pass to his guardian. The words "as he was the guardian," etc., have no legal effect in the writ, and may be disregarded as surplusage. [*Rollins v. Marsh*, 128 Mass. 116, 119].

judgment is given, either *against* or *for* him; it is error, and the judgment may be reversed by writ of error.(y) But by the English statutes 21 Jac. 1 c. 13, § 2, and 4 Ann. c. 16, § 2, if judgment, in such a case, is *for* the infant, upon verdict, or by confession, *nil dicit*, or *non sum informatus*, it is valid.(z)

And by the common law, where an infant sues as *co-executor* with an adult, both may appear by attorney.(a) For the suit being *en autre droit*, the personal rights of the infant are not affected by it; and therefore the adult is permitted to appoint an attorney for both.

Any person, in general, being of full age, and *sui juris*, may name himself next friend to an infant plaintiff(b); and in that character, may institute a suit in the name of the latter. But to guard the infant against injury from mismanagement, the court exercises the power of admitting, or dismissing, the next friend.(c)

THAT THE PERSON, NAMED AS PLAINTIFF, IS NOT (or rather that he *never was*) *in rerum natura*, is a good plea of this class (d); as where he is a *fictionis*, or *imaginary* person. For in such a case, there is, in fact, no plaintiff.

(y) Cro. Jac. 4; Cro. Eliz. 424; 1 Roll. Ab. 287; Carth. 123; 2 Saund. 212, (n. 4.); Bac. Abr. *Infancy*, &c., K. 1, 2. *Vide cont.* Cro. Jac. 441.

(z) 2 Saund. 212. (n. 5.)

(a) 2 Saund. 212, 213; Bac. Abr. *Infancy*, &c., K. 2; Carth. 123; 1 Roll. Ab. 288; Cro. Eliz. 542; 2 Stra. 784.

(b) 1 Eq. Ca. Ab. 72; Bac. Abr. *Infancy*, &c., K. 2.

(c) Stra. 304, 709; Bac. Abr. *Infancy*, &c., K. 2; 1 Ld. Ray. 332; Comb. 331.

By the New York Code, §§ [470, 472], the person who appears for an infant, (plaintiff, or defendant,) is called a *guardian*; and the term, *prochein amie*, is no longer used in our courts. And no such guardian can appear, unless he be appointed by an order, made by the court, or by a judge at chambers. See 13 How. Pr. Rep. 413. [As to appointment of guardian *ad litem*, see, *Platt v. Finch*, 60 App. Div. 312; *Van Williams v. Elias*, 106 App. Div. 288].

(d) Com. Dig. *Abatement*, E. 16, 17; Lawes' Pl. 104; 1 Wils. 302;

And if one of several co-plaintiffs is an imaginary person; that fact, pleaded as to *him*, will defeat the *whole* suit.(e) For where several persons sue, as *joint* plaintiffs, they must, regularly, recover, if at all, *jointly*.(f)

But where a suit is brought in the name of a person *once existing*, but who is dead, at the commencement of the suit, a plea that he was not *in esse when the writ was purchased*, is said to be ill(g): The proper plea, in such a case, being, that he was *dead* at the time.—This diversity, in the form of pleading, seems intended merely to mark the difference between the case of a person, named as plaintiff after his *death*, and that of a plaintiff altogether *imaginary*.

That the plaintiff was never *in esse*, seems also to be a good plea *in bar*.(h) For that a *right of action* should exist, in favor of an *imaginary* person, is plainly impossible.(i)

Pleas to the disability of the plaintiff *conclude*, by praying judgment; “if the said A. B. the plaintiff, ought to be answered”—or (when the disability operates only as a *temporary suspension* of the suit), “that the plaint may remain without day, &c.” i. e. until the disability be removed.(j)

1 Chitt. Pl. 435–6; *Guild v. Richardson*, 6 Pick. 370; *Doe v. Penfield*, 19 Johns. 308.

(e) Com. Dig. *Abatement*, E. 16, 17.

(f) There is an exception to this general position, when there is a *summons and severance*, in personal actions, and also, in many cases, where one of several co-plaintiffs *dies after* the commencement of the suit. *Vide post, Pleas in Abatement*.

(g) Com. Dig. *Abatement*, E. 16, 17.

(h) *Vide* 1 Bos. & P. 44; Bro. Ab. *Misnomer*, 93.

(i) That the nominal plaintiff, in the English *ejection*, is fictitious, is, however, not pleadable, in any form. His fictitious character is an essential part of the machinery of that action; and the fiction, being devised for the advancement of *justice*, cannot be contradicted. Indeed, the real defendant has generally no opportunity to plead the fact: since he is obliged, under the consent rule, to plead the *general issue*. *Vide* 4 M. & S. 301; 19 Johns. 169.

(j) 3 Black. Com. 303; Tidd, 585; Lawes' Pl. 109.

CHAPTER IV.

OF PLEAS IN ABATEMENT.

The term "abatement," in the language of pleading, signifies *prostration*, or *demolition*; and hence, to "abate" a writ, is to *prostrate* or *destroy* it.(a)

Pleas in abatement, in most instances, extend only to the *writ*, when the suit is commenced by original writ.(b) In some cases, however, pleas of this class may be pleaded to the *count*, even when the suit is thus commenced.(c)

But defects or mistakes, *apparent* upon the face of the declaration, *independently of any reference to the writ*, are not pleadable in abatement (d): the proper mode of taking advantage of such faults being by *demurrer*. On the contrary however, certain mistakes in the *declaration*, when *not apparent upon the face of it*, (such, for example, as *misnomer*, *variance* from the writ, &c.) are proper subjects of a plea in abatement.(e)

(a) Co. Litt. 134, b.

(b) 3 Black. Com. 301-3.

(c) 3 Black. Com. 301-3; Com. Dig. *Abatement*, G. 1; Doct. Pl. 1; Lawes' Pl. 102, 105.

(d) 1 Salk. 212; Willes, 478; 4 Cush. 279.

[Generally now, under the codes, matters of abatement not apparent on the face of the complaint must be pleaded in the answer. *O'Beirne v. Lloyd*, 31 N. Y. Super. 19; *Hurst v. Everett*, 21 Fed. 218].

(e) In respect to the precise office and extent of pleas in abatement, there is some confusion, or apparent inconsistency, in the books. Pleas of this class are sometimes mentioned in a manner implying that they extend only to the *writ*, and that *no* defects in the *count* can be reached by them. But this limitation of their effect

When the suit is commenced by *bill*, the defendant may plead in abatement of the "bill," as he may of the "writ," when it is commenced by writ. In the former case, the plea

is clearly too unqualified. It is indeed universally true, that a plea *to the writ*, if properly framed for its purpose, is a plea *in abatement*: But it is not always true, *e converso*, that a plea in abatement can extend to the *writ only*; for by the common law, various matters of abatement are pleadable to the *declaration*—though in consequence of certain modern rules of practice, in the English C. B. and B. R. pleas in abatement *to the declaration*, are, to a great extent, virtually abolished in those courts. And the change, thus introduced, between the ancient and modern practice, appears to be the chief cause of the apparent inconsistency above alluded to.—To explain, somewhat more particularly, what is here suggested, it may be observed, that pleas in abatement, *to the count*, which were frequent in the ancient practice, were founded chiefly upon some defect, mistake, or informality, appearing either in the *recital of the writ*, in the declaration, (which *recital* was then deemed necessary, in all cases)—or upon some *variance* between the count and the writ. (Lawes' Pl. 105; 1 Saund. 318, n. 3; Cro. Eliz. 829, 185, 330, 198.) But in the year 1654, a rule of court was established by the English C. B. ordering that thenceforth "declarations in actions upon the *case*, and general statutes, other than debt, should not repeat the original writ, but only *the nature of the action*" (1 Saund. 318 a. (n. 3.); Lawes' Pl. 105-6). And it seems that the more recent practice has somewhat extended the operation of the rule (Carth. 108; 1 Saund *ub. sup.*). The consequence has been, that in cases affected by this rule, all pleas in abatement, founded upon the *recital* of the writ in the count, have been abolished. And no advantage can be taken of any *variance* between the writ and the count, but by obtaining *oyer of the original writ*, (Com. Dig. *Abatement*, H. 1). But by a more recent rule of C. B. and B. R. established in the 12 Geo. 2, and 19 Geo. 3, it was ordered, *that oyer of the original should not thenceforth be granted*. And the effect of this rule has been, to abolish all pleas in abatement, founded upon any *variance* between the declaration and the writ. Thus, pleas in abatement *to the count*, are, in the modern practice of those two courts, almost unknown.—When, indeed as is most usual in B. R., the suit is commenced *by bill*, no distinction can exist between pleas to the *writ* and to the count. For, in these cases, the *bill itself* is the only original; and all pleas in abatement are *to the bill*. [See last preceding note, and *supra*, the reference to the Code provisions as to DEMURRER and ANSWER].

prays judgment of the *bill*, as in the latter it does of the writ. (f)

It has been stated in a former chapter, that in pleas of this class—as in all other dilatory pleas, the greatest *precision* and *certainty* are required, because dilatory pleas are odious, or at least not favored. Hence, the least inaccuracy or defect, in pleas of this kind, is fatal. (g)

It is a *general* rule, founded, upon the same principle, that a plea in abatement must “give the plaintiff a better writ” (h); i. e. it must be so pleaded as to *enable* the plain-

(f) 3 Black. Com. 303.

(g) Cro. Jac. 82; 3 T. R. 185-6; 5 Ib. 487; 8 Ib. 167; 2 Saund. 209, b.; Com. Dig. *Abatement*, 1, 11; Willes, 554; 1 Lill. Ent. 1 6; 2 H. Black. 530. [“They must be certain, positive and direct. They cannot be aided by Intendment or Inference.” *Budd v. Meriden Elect. R. R. Co.*, 69 Conn. 272. And see, *Miller v. Cross*, 73 Conn. 538; *Dubois v. Hutchinson*, 40 Mich. 262; *Capwell v. Sipe*, 17 R. I. 475; *Baker v. Compton*, 2 Head. 471. The plea must stand or fall by itself. *Breen v. Tex. & P. R. Co.*, 44 Tex. 302. Words cannot be supplied. *Morse v. Nash*, 30 Vt. 76, 80. And there must be no violation of the rule as to time of filing. *Huntley v. Holt*, 59 Conn. 102; *Hake v. Grove*, 99 Mich. 216].

(h) Com. Dig. *Abatement*, I, 2; Lawes’ Pl. 39, 103-4; 8 T. R. 515; 1 Lill. Ent. 6; Willes, 554; 2 Chitt. Pl. 418. *Vide* Yelv. 112 (n. 1.); 6 Pick. 369; Archb. Civ. Pl. (Amer. ed.) 334; [*Mohr v. Chaffe*, 75 Ala. 387; *Chicago & P. R. Co. v. Munger*, 78 Ill. 300; *Warren v. Sanders*, 27 Grat. 259].

A plea in abatement gives the plaintiff a *better writ*, which is the true criterion to distinguish a plea in abatement from a plea in bar. 1 Wms. Saund. 6th ed. 237.

The rule as stated in the text is, that the plea must be so framed as to enable the plaintiff, in a subsequent suit for the same cause of action, to supply the defect or avoid the mistake.

In Stephen on Pleading, 1st ed. 435, it is said the meaning of the rule requiring that a plea in abatement should give the plaintiff a better writ is, that in pleading a mistake in form, in abatement, the plea must correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ. *Wilson v. Nevers*, 20 Pick. 23.

Matter in abatement, which only delays the right to sue by defeating the particular action, cannot be pleaded in the same plea

tiff, (in a subsequent suit for the same cause), to supply the defect, or avoid the mistake, upon which the plea is founded. Thus, if the defendant pleads that he is misnamed, or that a wrong addition is given him, in the writ; he must show, in his plea, what his true name or addition is; and thus enable the plaintiff to avoid a similar mistake in a subsequent suit.⁽ⁱ⁾ And this rule is applied to indictments, as well as to civil actions.^(j)

The causes or grounds for pleading in abatement, may be either *intrinsic*, or *extrinsic*—either *apparent* upon the face of the writ, &c.; or *not* thus apparent.^(k)

These causes, in the order here proposed, are

1. MISNOMER, AND WANT OR MISTAKE OF ADDITION.

If the defendant is sued, or declared against, by a wrong name; he may plead the mistake in abatement.^(l) The ob-

or answer with matter in bar of all right of action; but must be pleaded, if then existing, before answering to the merits; else it is to be deemed to have been waived. *Morton v. Sweetser*, 12 Allen, 137. In Com. Dig. Abatement, I, 23, it is said that "After a plea to the action, the defendant shall not plead in abatement, except where he pleads it *after the last continuance*;" and such is the law. 128 Mass. 602.

In Massachusetts if a defendant pleads in abatement of the writ, and to the merits of the action, in the proper order, the fact that both pleas are filed at the same time, and even upon the same paper, does not operate as a waiver of the plea in abatement, if seasonably filed. *O'Loughlin v. Bird*, 128 Mass. 600.

In *Morton v. Sweetser*, 12 Allen, 134, the answer began by stating defenses on the merits, and ending with setting up matter of abatement, so that the defendant had, in the phrase of Lord Coke, "misordered" his pleas, and thereby lost the benefit of his plea in abatement. Co. Litt. 303, a; 128 Mass. 602.

(i) Bac. Abr. *Misnomer*, &c., F.; 1 Salk. 6, 7; Willes, 554; 1 Lill. Ent. 6; [*East v. Cain*, 49 Mich. 473].

(j) 6 M. & S. 88.

(k) Lawes' Pl. 102, 106.

(l) 8 Black. Com. 302; 1 Salk. 7; 3 East, 167; Bac. Abr. *Abatement*, D.

ject of this rule is, to prevent mistakes and confusion as to the *identity* of the person sued. A party may however sue, or be sued, by *any* name by which he is *known and called*, at the commencement of the suit (*m*); though it be not his baptismal, or original name. For he may be as fully indented by the former, as by the latter.

Where there are several co-defendants, the true proper name of *each* of them must be given. Describing them, even when sued as partners, by the style or name of the *co-partnership*, (as "A. B. & Co.") seems clearly not sufficient. For the name of a co-partnership is altogether *arbitrary*, and may not express the proper name of any one of the individual partners. (*n*)

By the common law, no other personal description of a party, sued or suing, was required, than his proper name, (including both his name of baptism, and surname), unless his dignity, or degree, were as high as that of *knight*—in which case, his degree was a necessary *addition* to his proper name: the title of *knight*, and all those above it, being deemed *parcel* of the proper name. (*o*) And this rule extends to both the plaintiff and the defendant. But the statute of *additions* (1 Hen. 5, c. 5), requires, that in all personal actions, appeals and indictments, there shall be added to the name of the *defendant*, his title, mystery, estate or degree, (as "knight"—"gentleman"—"esquire"—"yeoman"—"spinster," &c.) and his place of abode (the town, hamlet, &c.) and the county in which he resides, or has resided. (*p*) The title, &c. thus added to the defendant's name, is called his "*addition*;" and the absence of this addition, or the giving of a

(*m*) Wills, 554; 2 Wils. 367; 1 Bos. & P. 60; 1 East, 542; 2 Chitt. Pl. 590.

(*n*) 8 T. R. 508; 1 Leach's Cr. Cases, 240; 1 Chitt. Pl. 256.

(*o*) Bac. Abr. *Misnomer*, &c., B. 2; 2 Roll. Ab. 469; Comb. 189.

(*p*) Bac. Abr. *Misnomer*, &c., B. 2; 3 Black. Com. 302; Lawes' Pl. 106.

wrong one, in the writ, is pleadable in abatement. (q) But the addition of the defendant's degree, or mystery, with his present or late place of abode is held sufficient. (r) Where there are several co-defendants, the proper addition must be given to *each*, except where husband and wife are co-defendants—in which case the latter requires no addition. (s)

But this statute extends only to *personal* actions, appeals, and indictments. *Real* actions are not within its purview; probably because the defendant is supposed to be sufficiently identified, by his proper name and the *possession* of the land in question. (t) By the "appeals," mentioned in the statute, are meant those *criminal* prosecutions, which are so called.

At common law, neither want of addition, nor misnomer, was pleadable to an indictment for *felony*: the prisoner being identified by his personal presence. (u) But the rule, as now altered by the above statute 1 Hen. 5, is the same in indictments for felony, as in personal actions. The plea to such an indictment however, can in general be of little avail, eventually to the prisoner; since the court will, as a matter of course, detain him in custody, till another indictment can be framed and found against him. (v)

Misnomer, or want of addition, in describing *one of two* defendants, is not pleadable by the other. (w) For the former may, if he pleases, admit himself to be rightly named and described; (as he does of course, by not pleading the

(q) *Id.*

(r) 2 *Ld. Ray.* 1541; *Stra.* 556, 816, 924.

(s) *Bac. Abr. Misnomer, &c., B.*; 1 *Chitt. Pl.* 247.

No *addition* is ever required, in New York. And if a plaintiff be ignorant of the name of a person, whom he wishes to sue, he may sue him by *any name*; and must put the true name, when he finds it out. Code § [451].

(t) *Bac. Abr. Misnomer, &c., B.* 2; 6 *Mod.* 85.

(u) *Bac. Abr. Abatement, D.; Indictment, G.* 2.

(v) 2 *Hale, P. C.* 176, 238; 1 *Chitt. Crim. Law*, 203.

(w) *Bac. Abr. Misnomer, &c., G.; Abatement, D.*

mistake himself in abatement); and his co-defendant cannot object to such admission.—The same rule holds in indictments against several.(x)

If a defendant, in pleading misnomer, gives himself, in the commencement of his plea, the same name by which he is sued; (as if A. B., when sued by the name of C. D., begins his plea by saying, "And the said C. D. comes and defends," &c.); his plea is ill.(y) For, by calling himself "C. D.," in the first instance, he is *estopped* to aver that that is not his true name. He should begin, by saying, "And A. B., against whom the plaintiff has sued out his writ, by the name of C. D., comes, &c."(z)

And if the recognizance of bail gives the defendant the *same* name by which he is sued, (though a wrong one); he is *estopped* to aver that it is a misnomer.(a) For by the entry of the recognizance in this manner, he places upon the record the name, given him in the writ, *as his true name*. And the rule is the same, even though the defendant himself does *not join* in the recognizance.(b) For although the recognizance, in such a case, is not in strictness the defendant's *act*; yet being by his *procurement*, he is concluded by it.

If one executes a specialty, by a wrong name; it is held that he must be sued upon it, by the same name by which the instrument is executed; and that his true name should be added, under an *alias*.(c) For he is *estopped* by the deed to deny the name, by which he executed it; and if sued by his true name, there would be a *variance* between the deed and the writ.

(x) 2 Hale, P. C. 177; Bac. Abr. *Misnomer*, &c., G.

(y) 2 Saund. 209, b.; 5 T. R. 487; Comb. 188; Lawes' Pl. 92; Carth. 207; 1 Show. 394.

(z) Id.; 2 Chitt. Pl. 416, 417; 1 Lill. Ent. 1.

(a) Willes, 461; 1 Salk. 8; 2 Chitt. Pl. 590; 2 New Rep. 453.

(b) 2 New Rep. 453.

(c) 2 Stra. 1218; 1 Bulstr. 216; Bac. Abr. *Misnomer*, B. 1.

Misnomer of the *plaintiff*, is also pleadable in abatement. *(d)* And the plea may be answered, by the same replication, as when the misnomer is of the defendant. *(e)* But the want of *addition*, or a wrong one, in the description of the plaintiff, is no cause of abatement, except as at *common law*. For the statute of *additions* does not extend to *plaintiff*. *(f)* because there was supposed to be no danger of mistakes in regard to their identity.

Misnomer, &c. as such, is pleadable only in *abatement*. *(g)* It is no plea in *bar*; because it does not deny the *cause of action*; nor can it be assigned for error, unless it has been pleaded in abatement, and overruled. For if not thus pleaded, the exception is waived, as all matters of mere abatement are, if not pleaded in abatement. *(h)*

To a plea of misnomer, (whether of the plaintiff, or defendant), it is a good replication, that at the commencement of the suit, he was *known and called*, as well by the name, by which he sues or is sued, as by that set forth as his true name, in the plea. *(i)*

Generally no other *addition*, than his place of abode, need be given to either of the parties; but this must be given to both; and of course to all the co-parties, plaintiffs or defendants. *(j)*

In concluding this head of abatement, it is proper to remark, that in the English Court of Common Pleas, and (when the suit is by *original*), in that of the King's Bench

(d) Com. Dig. *Abatement*, E. 18; 1 East, 542.

(e) 1 East, 542.

(f) Bac. Abr. *Misnomer*, &c., B. 2.

(g) Bac. Abr. *Misnomer*, &c., E.; Carth. 124; Comb. 188; 1 Bos. & P. 40; 6 M. & S. 46; [*Miller v. Stillmer*, 22 How. Pr. 518; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189].

(h) 6 T. R. 766; 2 H. Black. 267, 299; 1 Salk. 2.

(i) 2 Wils. 367; 1 East, 542; 1 Bos. & P. 60; 2 Chitt. Pl. 590; Willes, 554.

(j) In New York no "place of abode" is required, as to either party.

also, pleas in abatement, founded upon the want, or the falsity, of the defendant's *addition*, were virtually abolished, by the operation of a *rule of practice* (established in the former of those courts, in the 11 & 12 Geo. 2, and in the latter, in the 19 Geo. 3), ordering that *oyer* shall not thenceforth be granted *of the original writ*.(k) For no addition is given, or required to be given, to either party, in the *declaration*; and its omission or falsity, in the writ, cannot be shown, without an inspection of the *writ itself*. The effect of this rule, indeed, was the abolition, in those courts, of all pleas, which could not be verified without *oyer of the writ*.

Yet if anything, which, in the writ, would be matter of abatement, appears in the *declaration*; it may be pleaded to the *writ*—the above rule of court notwithstanding. If, for example, there is a misnomer, or a nonjoinder or misjoinder of parties, in the *declaration*; the mistake may be safely pleaded, as a fault in *the writ*. For the declaration is conclusive against the plaintiff, that the parties, and the names given them, are the same in the *writ*, as in *itself*: because the plaintiff, by averring the contrary, would himself necessarily disclose a *variance* between the declaration and the writ, which would be fatal to the suit. And thus, without any examination of the writ, the defendant may, in cases like these, abate it *through the medium of the declaration*.

When the suit is commenced by *bill*—which is itself considered as the *original*, and of which there is no occasion for *oyer*—the above rule of court has no effect.

And where—as in the practice of the courts of some of the United States—the writ and declaration are *embodied*, as parts of one and the same instrument no such rule can exist.(l)

(k) Doug. 227; 1 Saund. 318, a. (n. 3.)

(l) Vide 5 Mass. 285.

2. COVERTURE OF THE DEFENDENT.

If a *feme covert* is sued without her husband, she may plead her coverture in abatement.(*m*) This defence is allowed, for the protection of her *privilege*, and of the husband's *rights*; both of which might be violated by a recovery against her.

But this plea is no defence, where the husband, though actually living, is *civilly dead*—as, where he is *banished*, or has *abjured* the realm, or is an *alien enemy*, and out of the realm, &c. For in either of these cases, the wife is in law considered as a *feme sole*.(*n*) And whenever she is, from any cause, regarded in law *as sole*, this plea cannot avail her.(*o*)

If a woman, being sued while sole, marries pending the suit; she cannot plead this supervenient coverture, in abatement, or at all.(*p*) For it would be manifestly unreasonable, to allow her to defeat, by her own act, a suit *rightly commenced* against her.(*q*)

When a *feme covert* is sued alone, she can plead her coverture only *in abatement*.(*r*) For the defence does not deny the *right of action*; and therefore, if she omits to plead it as a *dilatory* plea, she *waives* it, so far as regards her own privilege, and tacily admits that she is liable to be sued alone.

(*m*) Com. Dig. *Abatement*, F. 2; Co. Litt. 132, b.; 1 Salk. 7.

(*n*) Com. Dig. *Abatement*, F. 2; Co. Litt. 132, b.; 133, a.; 1 Salk. 116.

(*o*) *Vide* 3 Campb. 124; 15 Mass. 31; 6 Pick. 89; 5 Ib. 461; 11 East, 304, *notis* Day; 2 Kent's Com. 132, 214, n.; 3 Barn. & Cress. 291.

(*p*) Bac. Abr. *Abatement*, G.; 1 Lill. Ab. 526; 2 Stra. 811; 2 Ld. Ray. 1525; Cro. Jac. 323; 1 Ves. 182; 2 Roll. Rep. 53.

(*q*) In New York a married woman's right to sue, whether *alone*, or with her husband, is regulated by express statutes. (Code, § 450.) And her marriage, pending suit, does *not* *abate* the *suit*,—(*enacting the common law*.) [See C. C. P., § 761.]

(*r*) Com. Dig. *Abatement*, F. 2; 3 T. R. 631; Carth. 12.

She must also plead her coverture *in person*.(s) Because she is legally incapable of appointing an *attorney*.

But she can by no admission or omission, waive any right of her *husband*: and therefore, if she omits to plead her coverture, he may, at any time come in and plead it in *bar*.(t)

And if both of them omit to plead it, and judgment is given against her; the judgment may be reversed, by writ of error, in which they must both join as plaintiffs in error.(u) If the writ of error is in the name of either of them *alone*, it may be *quashed*.(v) For the wife cannot prosecute it alone, by reason of her legal disability; nor can the husband alone, because *her* rights, as well as his own are involved in it.

3. DEATH OF PARTIES.

By the common law, the death of a sole plaintiff or sole defendant, *pendente lite*, abates the suit (w): there being after such an event, but *one* party to the action. And if, after the death of either party, final judgment should be given, for or against him; it would be *erroneous* (x)—as being for or against a party not *in esse*. But by the Statute 17 Car. 2, c. 28, it was enacted, that the death of either party, “*between verdict and judgment*, shall not be alleged for error, so as judgment be entered within two terms, after such verdict” (y) *nunc pro tune*.(z)

(s) 2 Saund. 209, c. (n. 1.); 1 Lill. Ent. 1; 2 Chitt. Pl. 415, 425.

(t) Bac. Abr. *Abatement*, G.; Sty. 280; 1 Salk. 400; 3 T. R. 631; 5 Ib. 681.

(u) Id.; 3 Esp. Rep. 19; 4 Mass. 661.

(v) 3 Esp. Rep. 19; Bac. Abr. *Error*, B.

(w) Bac. Abr. *Abatement*, F.; Com. Dig. *Abatement*, H. 32.

(x) Carth. 338-9; T. Ray. 59, 463; Bac. Abr. *Pleas*, &c., Q.

(y) Bac. Abr. *Abatement*, F.

(z) In New York the death of a party, at any stage of the suit, abates no suit, *if the cause of action survive*. (Code, § [755].) The new shape of the action is directed by the court, by an order on motion. See 10 How. Pr. Rep. 253; 9 Ib. 190, 268, 269, 296; 3 Ib. 385;

By the common law also, if one of *several plaintiffs* dies pending the suit; it will, in most cases, abate.(a) For by joining in the suit, they assert a *joint* right of recovery, which, as such, is destroyed by the death of either of them.

But this last rule does not apply, in its full extent, to such personal actions as admit of *summons and severance*, and in which an entire indivisible thing is to be recovered.(b) For in such actions, after one of two co-plaintiffs has been summoned and severed, he ceases to be a *party*; and the other becomes a sole plaintiff, prosecuting for the whole amount, or matter in demand, and therefore if the severed plaintiff afterwards *dies*, pending the action, his death has no effect upon the suit.(c) If one of several, named as co-plaintiffs, was dead at the issuing of the writ; the fact may be pleaded in abatement.(d) For it *falsifies* the writ.

If one of several *co-defendants* dies, pending the suit; his death is, *in general*, no cause of abatement, even by the common law.(e) For by being sued together—(a proceeding in which they are passive)—co-defendants do not, like co-plaintiffs, either assert or admit any thing, which requires them all

15 Ib. 128. It has, however, been held, as to an action of *ejectment*, that it survives against the *heirs at law* of a deceased defendant; 4 How. Pr. Rep. 358, and *contra*, 7 Ib. 31; 14 Ib. 71. And see 10 Ib. 253. As to a sole defendant in *replevin*. 5 Abbott, 351: *After verdict*, in *any* action for a *wrong*, the suit does *not* abate. Code, [sec. 764, specifying certain actions].

(a) Bac. Abr. *Abatement*, F.; *Joint-tenants*, &c., K.; 10 Co. 134; 6 Ib. 26; Com. Dig. *Abatement*, H. 33.

(b) *Summons and severance* is a proceeding, by which one of several persons named as co-plaintiffs, in a writ, is, on his neglecting to appear and prosecute, summoned to appear, &c., and if he refuses to join in prosecuting the suit, is *separated* from it, by a judgment of *severance*. As to what cases admit of summons and severance, see Off. Ex'r. 96, 104; 6 Co. 25; Bac. Abr. *Summons & Severance*, F.; Co. Litt. 139.

(c) Bac. Abr. *Abatement*, F.; Cro. Eliz. 652.

(d) Bac. Abr. *Abatement*, F.

(e) Hardr. 113, 151; Cro. Car. 426; Bac. Abr. *Abatement*, F.

to act or proceed jointly: and hence, on the death of one of them, if the *cause of action* is such, as would *survive* against the survivors, (as is almost universally the case); the plaintiff may, by suggesting the death of the former upon the roll, proceed in the same suit, against the latter.

The inconvenience of abatement, by the death of parties, was in a great measure, remedied by the Statute 17 Car. 2, c. 8, and by the 8 & 9 W. 3, c. 2, §§ 6 & 7; by which last it is enacted, "that if there be *two or more* plaintiffs or defendants, and one or more of them should die, if the cause of such action should survive *to* the surviving plaintiff or plaintiffs, or *against* the surviving defendant or defendants; the writ, or action, shall not be thereby abated. But such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants": and that if any sole *plaintiff* happen to die, after an interlocutory judgment, and before final judgment obtained therein; the said action shall not abate by reason thereof; if such action might originally, be prosecuted or maintained *by* the executors or administrators of such plaintiff; and if the *defendant* die, after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might originally be prosecuted or maintained *against* the executors or administrators of such defendant; and the plaintiff, (or if he be dead after such interlocutory judgment), his executors or administrators shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, (or if he died after,) then against his executors or administrators to show cause why damages, in such action, should not be assessed and recovered by him or them.

Under the former of these statutes, (that of 17 Car. 2), the death of a party, *after verdict*, does not abate the suit; but judgment in pursuance of the verdict, may be entered, (within the time prescribed, by the act), as if the death had

not intervened: (f) And under the latter statute (8 & 9 W. 3), if a *sole* plaintiff dies, after an interlocutory judgment (g) and before final judgment in an action, the cause of which would have *survived to* his personal representatives—or if a *sole* defendant dies, after such a judgment in an action, the cause of which would have survived *against* his personal representatives (h) the suit shall not abate; but on a *sci fa.* prayed out, as prescribed in the act, the suit may proceed to final judgment: and if one or more of several co-plaintiffs die, pending an action, the cause of which would have survived *to* the surviving plaintiffs—or if one or more of several co-defendants die, pending an action, the cause of which would have survived *against* the surviving defendants: The suit shall not, in either case abate; but—such death being suggested upon the record—the action shall proceed between the surviving parties.

It will be perceived, that the second clause in the above

(f) 1 Salk. 42; 1 Sid. 385; Toll. on Ex'rs, 442-3.

(g) The interlocutory judgment, contemplated in the above enactment, is such an one, as leaves nothing more to be ascertained, than the *amount to be recovered*, in damages or otherwise—as, where a demurrer to the declaration, or to the plaintiff's evidence, has been *overruled*—or, where the defendant has submitted to a judgment by *default*, *non sum informatus*, *nil licit*, &c.; in each of which cases, nothing more is necessary to be done, as preparatory to final judgment, than to ascertain *how much* the plaintiff is entitled to recover. (*Vide* 1 Lill. Ent. 647; 6 Mod. 144; 4 T. R. 431; Toll. on Ex'rs. 443.) The statute of Connecticut prevents the suit from abating, when the death happens in any stage of the suit—whether *after* or *before* an interlocutory judgment.

(h) When a cause of action is such as, on the death of either of the sole parties to it, might have been *originally prosecuted* by or against his personal representatives, it is one, which *would survive* to or against such representatives, within the meaning of the above distinctions: But when it could *not* have been thus originally prosecuted, it is one which *would not* thus survive. But *what* particular causes of action do, or do not, thus survive, is an inquiry, which falls appropriately under a different title—that of *Executors and Administrators*.

statute, of W. 3, (viz. that which provides against abatement, by the death of a *sole* party), extends only to *personal* actions—i. e. such as survive to or against *personal* representatives. *Real* actions therefore still abate as at common law, on the death of a *sole* plaintiff or defendant. But real actions, in which there are *several* co-plaintiffs or co-defendants, and of which the causes are such, as *survive* to or against the surviving parties, are within the purview of the first clause of the act.(i)

4. VARIANCE.

There are divers instances, or particulars, in which variance is pleadable in abatement—as where the *count* varies from the *writ*—or, where the writ varies from the *record*, *specialty*, or *instrument*, on which the action is brought.(j) For in the one case, the count does not maintain or pursue the writ; and in the other, the writ is not adapted to the cause of action.

As to variance between the writ and the count, this diversity is to be observed: if the variance is in matter of mere *form*, (as in time, or place, when that circumstances is *immaterial*, or in any other particular which is so); advantage can be taken of it, only by plea *in abatement* (k): But if the variance is in matter of *substance*—(as if the writ sounds in *contract*, and the declaration in tort or *è converso*—or if the writ demands one *thing*, or subject, and the declaration another); advantage may be taken of it, even by motion in arrest of judgment.(l) For as it is *the writ*, which gives authority to the court to proceed in any given suit; it is ob-

(i) The New York statute covers *all* actions in which the cause of action survives, or *continues*: which would cover *real* actions. Code Civ. Proc., § [755].

(j) Com. Dig. *Abatement*, G. 1; H. 7, 9; 6 Co. 14; 2 Wils. 85, 395; Cro. Eliz. 722; 1 H. Black. 249.

(k) Yelv. 120; Latch, 173; Bac. Abr. *Abatement*, I.

(l) Hob. 279; Cro. Eliz. 722.

vious, that the court can have *no authority* to hear and determine a cause, *substantially* different from that mentioned in the writ. In some jurisdictions it was long customary to plead in abatement any variance between the record or instrument declared upon, and the description of it in the *declaration*. But the more proper mode of taking exception for such a variance, is either by objecting to the record, &c. as *evidence*, under the general issue—and in that way, compelling a nonsuit (*m*) (because the record or writing, offered in evidence, will appear to be a *different* one from that declared upon); or by reciting it upon the record, on oyer, and then *demurring* to the declaration (*n*): this latter course being justified, on the ground that the instrument, &c. thus recited, on oyer, becomes in effect, part of the *declaration*. (*o*)

Though, as heretofore stated, no advantage can be taken of *misnomer*, as *such*, except by plea in abatement: yet when misnomer occasions a *variance* (as, if A. B., having executed a bond by his true name, is sued upon it, and declared against by the name of C. D.); advantage may be taken of the mistake, as a *variance*, in either of the two modes last before mentioned: i. e. under the *general issue*, or by *demurrer*, on oyer (*p*): Though if the mistake is treated, by the defendant, as a *misnomer*, (in which case, no use is made of the *instrument*, in evidence or otherwise); he must plead it in *abatement*.

Pleas in abatement, for any variance between the writ and the count, are now, however, practically abolished in England, in C. B. and (where the suit is by original) in B. R. also, by a rule of practice heretofore mentioned, refusing

(*m*) 4 T. R. 612, 687–8; 1 Ib. 656; 1 Bos. & P. 7; 1 Saund. 154, n.; Doug. 665; Cowp. 766–7.

(*n*) 1 Saund. 317; Com. Dig. *Pleader*, 2, 3; Hob. 18; Lawes' Pl. 98–9.

(*o*) 1 Vent. 43; 1 Saund. 316; Carth. 513; 6 Mod. 28, 237.

(*p*) 4 T. R. 611, 612; 3 Bos. & P. 559; 1 Campb. 195.

oyer of the original writ. And the operation of this rule extends to all pleas in abatement which cannot be proved without an *examination* of the original writ. (q)

5. NONJOINDER AND MISJOINDER OF PARTIES.

In what cases, two or more persons ought or ought not to be joined as co-parties, (either as plaintiffs or defendants), in one suit, has been already explained. The present inquiry is, in what manner *advantage is to be taken* of a mistake in respect to the proper parties. (r)

Under this head, it may be laid down as a universal rule, applicable both to actions *ex contractu* and *ex delicto*, that if one person sues alone, when the right of action is in *two or*

(q) Lawes' Pl. 97, 105; 1 Saund. 318, (n. 3.); 3 Bos. & P. 395; 7 East, 383; 6 T. R. 363; 1 Chitt. Pl. 440.

(r) In New York, since by the Code cause for *abatement* is to be taken advantage of, by *demurrer*; and as the cause for demurrer, which relates to joinder of parties, is specified as "a defect of parties," plaintiffs or defendants: a *misjoinder* of parties is held *not* to be a ground for demurrer; as there is no *deficiency* in having *too many* parties. Therefore, misjoinder is to be set up by *answer*. 8 How. Pr. Rep. 234; 20 Barb. 339.

[That there is a misjoinder of parties *plaintiff* is now a ground of demurrer in New York. N. Y. C. C. P., § 488, subd. 5. But a demurrer will not lie because of a misjoinder of parties *defendant*. *Adams v. Stingerland*, 87 App. Div. 312. A "defect" of parties (N. Y. C. C. P., § 488, subd. 6) refers to an omission, not to a misjoinder. *Tew v. Wolfsohn*, 77 App. Div. 454.

But the defect of parties, if not apparent upon the face of the complaint, must be taken advantage of by answer. If the objection appears upon the face of the complaint and is not taken advantage of by demurrer it is waived. *Hyde & Sons v. Lesser*, 93 App. Div. 320; *Van Zandt v. Grant*, 67 App. Div. 70.

Only a defendant for his own protection can demur for a defect of parties defendant. *Thompson v. Richardson*, 74 App. Div. 62.

In Connecticut an action is not defeated by misjoinder of parties: the parties improperly joined may be dropped at any stage of the cause by order of the court as the interests of justice may require. *Fairfield v. Southport Nat. Bk.*, 77 Conn. 423].

more, jointly (*s*)—or if two or more sue as co-plaintiffs, when the right of action is in *one* of them only (*t*); the mistake is pleadable in *abatement*: Because, without reference to the merits, the suit is in both cases, brought in an *improper manner*, in regard to the parties.

On the other hand, if one is sued alone, when by law another should have been joined with him, as co-defendant—or if two or more are sued together, when by law the action should have been brought against *one* of them only; the nonjoinder in the one case, and the misjoinder in the other, is, in all cases, pleadable in the same manner. (*u*)

In some cases, falling under the two last rules, the exception can be taken *only* by plea in abatement: In others, it may be taken, at the election of the defendant, either by pleading in abatement, or under the *general issue*; or, as the case *may* be, by *demurrer* on oyer—by motion in *arrest of judgment*—or by writ of *error*.

And for the purpose of determining, in any given case, whether a mistake in the joinder or nonjoinder of a party, is pleadable *only* in abatement—or whether advantage may be taken of it, under the *general issue*—the following distinction, it is believed, will be found to furnish the true criterion:—

If the proof, which supports the objection arising from the nonjoinder or misjoinder of a party, goes in *denial* or *disproof of the declaration*, or of any material allegation in it; advantage may be taken of the mistake, as well under the *general issue*, as by plea in abatement (for whatever denies the declaration, goes to support the general issue). But if the proof, which shows the mistake, is *not inconsistent* with

(*s*) Com. Dig. *Abatement*, E. 8-14; 1 Salk. 4; 7 T. R. 243; 1 Saund. 291, (n. 4.); Co. Litt. 164, a.; 189, a.; 195, b.; 198, a.

(*t*) Com. Dig. *Abatement*, E. 15; Cro. Eliz. 143; 1 Leon. 315.

(*u*) 5 Burr. 2611; 1 Saund. 153, (n. 1.); 291, b. (n. 4.); 5 T. R. 651; Com. Dig. *Abatement*, F. 6; 2 East, 574; 1 Chitt. Pl. 75-6.

any material part of the declaration; the exception can be taken, only by a *plea in abatement*: because whatever does not contradict the declaration, does not conduce to support the general issue.(v)

TO APPLY THIS DISTINCTION:—FIRST TO THE NON-JOINDER OR MISJOINDER OF PARTIES, AS PLAINTIFFS—In an action on CONTRACT, if one of the co-parties to it sues alone, when the right of action is in himself *and another*—or if two or more sue together, when the right of action is in *one* of them only; advantage may be taken of the mistake, as well under the *general issue* as by *plea in abatement*.(w) If therefore upon an obligation or promise, made to A. and B. jointly, A. sues alone, as on a contract made with himself only—or if on a contract made with A. *only*, he and B. sue, as on a contract made with both of them: the suit may be defeated, in either of the above modes. For in each of these cases there is a *variance*: the contract offered in evidence, being *not the same* as that declared upon. In other words, the fact, (or proof), that the right of action is *joint*, in the former case, or that it is *not so*, in the latter, goes in *disproof* of the declaration.

And if in either of the two last cases, the action is founded upon a *written instrument*; advantage may be taken of the mistake, not only in either of the two modes just mentioned, but in another also: viz. by praying *oyer* of the instrument, reciting it, *verbatim*, upon the record, and *demurring* to the declaration.(x) For it is a general principle, that a written instrument, pleaded by one party, when thus recited on the

(v) It is not pretended that all the cases conform to this distinction; but on principle, it appears to be the only correct one.

(w) 1 Saund. 291, f. (n. 4.); 1 Chitt. Pl. 209, & *seq.*; 1 Taunt. 7; 1 Bos. & P. 75; 2 Stra. 820, 1146; 2 T. R. 282; 5 Ib. 709; 1 Esp. Rep. 183; Bull. N. P. 152; Peake Ev. (2d ed.) 205; 2 Mass. 510; 6 Pick. 360.

(x) 1 Saund. 153 (n. 1.), 291 f. (n. 4.); 1 Bos. & P. 67; 1 Chitt. Pl. 209.

record by the other, becomes *parcel* of the former party's *pleading*.

And if in an action, on *contract*, brought by a sole plaintiff, it appears, upon the face of the *declaration*, or of any other pleading on the plaintiff's part, that another ought to have been joined as co-plaintiff; the mistake is incurable, even by verdict.(y) If therefore, in an action of debt, covenant broken, or assumpsit, brought by A. alone, it appears from *his own* pleading, that the contract was made with himself and B. *jointly*, and that B. is *still living*, (as he is presumed to be, unless the contrary appears, in the declaration); the defendant may demur, *without* reciting the contract; or may, after verdict, move in arrest of judgment, or reverse a judgment against him, on writ of error.(z) For in this case, as it appears from the plaintiff's *own showing*, that he alone has no right of action; the defendant is not under the necessity of showing the mistake, by *pleading* the fact which has occasioned it.

And undoubtedly the same rule must apply to an action, brought by *two* plaintiffs, on a contract which appears, from their own pleading, to have been made with *one* of them only.

But the general rule, that if one of two persons, having a joint right of action *ex contractu*, sues alone, advantage may be taken of the mistake, under the *general issue* does not extend to actions brought by one, suing in a *representative* capacity. Hence, if one of two *co-executors* sues alone, on a contract made with their testator, advantage can be taken of the nonjoinder of the other only by plea *in abatement*.(a) For as the executors are not parties to the *contract*; the nonjoinder of one of them occasions no *variance*, and does not in any respect involve a *contradiction* of the declaration: in-

(y) 1 Saund. 153 (n. 1.), 291 b. (n. 4.; Esp. Dig. 304; 2 Stra. 1146; 1 Bos. & P. 67, 74; 1 East, 497.

(z) Id.

(a) 1 Saund. 291, g. (n. 4.); 3 T. R. 558; 1 Chitt. Pl. 8, note (g) 13.

asmuch as the fact that there is another executor, who should have been joined as co-plaintiff, is not inconsistent with the description, in the declaration, of the contract made with the *testator*.

In an action EX DELICTO, if one sues alone, when another should have been joined—(as where one of two joint-tenants, or of any two persons, whose *joint* right has been violated by a tort, sues for it, without joining the other)—advantage can be taken of the nonjoinder of the latter, *only* by plea in abatement (*b*): because the fact, that another was interested jointly with the plaintiff, does not go in support of the *general issue*. For proof that the right violated was *joint*, is no proof that the defendant has not injured the plaintiff's property: nay, it *admits* that fact, and shows merely that the injury was not to his sole property. But this latter fact does not disprove the *declaration*.

In this last case however, the defendant may prove, under *the general issue*, the interest of the other party, who is not made co-plaintiff in the suit—not, indeed, for the purpose of defeating the action; but for that of taking off a *moiety* of the *damages*. (*c*) For otherwise, the plaintiff might recover damages to the *whole* amount of the injury; and still leave the defendant liable, for a moiety of them to the other party in interest. (*d*)

If *two* sue together, in tort, when the right of action is in *one* of them only—(as if, for a trespass upon the sole property of A., he and B. sue, as co-plaintiffs); advantage of the misjoinder may be taken, either in abatement, or under the *general issue* (*e*): because the fact, that A. is the sole owner

(b) 6 T. R. 766; 1 Saund. 291, f. g. h. (n. 4.); Cro. Eliz. 554; Godb. 172; Latch, 152; 5 Co. 18, b.; 5 East, 407; 2 Stra. 820; 1 Johns. 471; 6 Ib. 108; 1 Wend. 380; 6 Mass. 462; 2 Ib. 511; 11 Ib. 419; 10 Allen, 461, 462.

(c) 5 East, 407; Peake Ev. (2d ed.) 205.

(d) 7 T. R. 279; 10 Allen, 461, 462.

(e) Cro. Eliz. 143, 473; Gouldsb. 77; Clayt. 121; Bac. Abr. Tresp.,

of the property, *contradicts* the declaration; since it proves that the trespass committed, was not upon joint property of A. and B., and consequently, is not the trespass complained of.

AS TO THE JOINDER OR NONJOINDER OF DEFENDANTS.—In an action on *contract*, if one is sued alone, where another ought by law to have been made co-defendant with him—(as if A. is sued alone on a joint obligation or promise, made by himself and B.); advantage can be taken of the nonjoinder of B. only *in abatement*; unless the mistake appears. (as hereafter mentioned), from the *plaintiff's own pleading*. (f) For the obligation in A's act, though not his *sole* act; and the promise in his, though not his *sole* promise. The fact then, that B. is a co-obligor, or co-promissor with A., does not prove that the obligation, in the one case, is not A's act, nor that A. *did not promise*, in the other (g) and therefore does not *disprove the declaration*.

I, 2, (3); *Lacy v. Barns et al.*, Sup. C. (Connecticut) 1805, M. S.; 6 Pick. 222; 10 Allen, 462; Gow on Partnership, 159.

(f) 5 Burr. 2611; 2 Black. Rep. 947; 5 T. R. 651; 7 Ib. 313; 1 Saund. 291, b. (n. 4.); 2 N. Rep. 365; Cowp. 832; 5 Co. 119; 1 Bos. & P. 72; 18 Johns. 459. *Cont.* 2 Salk. 440.

(g) It is suggested by Mr. Serjeant Williams, (1 Saund. 291, f. g. (n. 4.)), that since the nonjoinder of one of two joint *promisors as defendant*, is held to be only matter of *abatement*, the rule ought, for the sake of consistency, to be the same as to joint *promisees*; i. e., that the nonjoinder of one of two joint *promisees as plaintiff*, should be pleadable in *abatement only*. But with submission, are not the two cases essentially different? If A. & B. make a joint promise, it is nevertheless true, that *each* of them promises: And if so, it follows, that a declaration on the promise, against A. alone, alleging that *he* promised, is not disproved by the admission that B. promised *jointly with him*. But if a promise is made to A. & B. jointly, it would seem not correct, to say that there is a promise to *each* of them: And therefore, a declaration by A. alone alleging the promise to have been made to him, without naming B. as a co-promisee, is falsified, by proof that the promise was made to *both of them jointly*. In other words, there is a *variance* between the declaration and the proof.—Such, at any rate, is the principle of

The rule is the same, and for the same reason, where two only are sued upon a *joint and several* contract, made by *three* or more. (*h*) For the fact, that another or others bound themselves by the same contract, does not prove that the *defendants did not* contract, as stated in the declaration.

But in an action on contract, if it appears from the face of the *declaration*, or of any other pleading on the part of the *plaintiff*, that a person, not made defendant in the suit, was a joint contractor with the defendant, and that such person is still living, (as he must be presumed to be, unless the contrary is alleged); the nonjoinder of him as defendant, is a good ground of *demurrer*, or motion in *arrest of judgment*—and (if judgment be given for the plaintiff), may be assigned for *error*. (*i*) For in this case, the pleading of the plaintiff himself shows, that he has no right to recover in the suit, *as it is brought*; and as the mistake appears upon the record, by his *own showing*; there is no need of the defendant's *pleading* it.

If, on a contract made by one person only, he and *another* are sued, as upon a contract made by *both*, the misjoinder is a good ground of defence, under the *general issue*. (*j*) For the contract made is *not the same*, as that declared upon. The proof of the former therefore *disproves* the declaration.

And in an action against *two* as joint contractors—as in *assumpsit* against A. & B. as joint promissors—if the jury find that A. promised, but that B. did *not*; A. may arrest the judgment. (*k*) For the contract declared upon, is disproved,

the distinction recognized by the authorities—a distinction, which, it is believed, is *not* “without a difference.”

(*h*) 1 Saund. 291, e. (n. 4.); Bro. Abr. *Obligatton*, 94; Yelv. 27, a, note; 1 Peters, 73.

(*i*) 5 Burr. 2614; 1 Saund. 153 (n. 1.), 291 b., c. (n. 4.); 6 T. R. 769; 1 Vent. 34.

(*j*) Clayt. 114; 1 East, 48; 2 Day, 272; 2 New Rep. 454; 11 Johna. 101; 1 Esp. Rep. 363.

(*k*) 3 East, 62; 1 Keb. 284; Carth. 361; 3 Brod. & Bing, 54.

by the verdict.(l) And when the action is thus brought against *two*, upon a contract made by *one* of them only, the plaintiff cannot enter a *noll. pros.* as to the other, and then proceed against the party bound, alone.(m) To allow this, would be to enable the plaintiff, by his own act, not only to defeat a good defence upon the merits; but also virtually to *substitute* one action for another—or rather, to transform an action against A. & B., into an action against A. alone.

If several are sued for a TORT, committed by *one* of them only; the joinder of the others is no ground of *abatement*, nor can advantage be taken of it, as a *misjoinder*, in any way.(n) For of co-defendants, in actions *ex delicto*, some may be *convicted*, and others *acquitted*; and the proper plea for those not actually guilty, is the *general issue*. But a plea in *abatement*, by one of the defendants, that the wrong in question was committed by the *others*, without his concurrence, is ill; because it is in effect, the *general issue*, which is pleadable only to the action.

If, on the other hand, one is sued alone, for a *tort* committed by himself and *others jointly*; the nonjoinder of the others, is in general, no ground of exception, either in abatement or otherwise.(o) For a tort, committed by several, may regularly be treated as *joint* or *several*, or as *partly joint*, and *partly several*, at the election of the plaintiff. And as he consequently has, by the general rule the right by law, to sue *any one* of them only—or all—or any number of them together—or *each* of them, in a several action; the nonjoinder of any of the wrong-doers is no defence, in any form.

But there is an exception to the last rule, where one is

(l) 1 Keb. 284.

(m) 4 Taunt. 470; 3 Esp. Rep. 76; 5 Ib. 47. Cont. 5 Johns. 160; 1 Pick. 500.

(n) 1 Saund. 291, d. (n. 4.)

(o) Bac. Abr. *Tresp.*, G. 1 & I. 1; 8 Co. 159; 1 Saund. 291, d. (n. 4.); 3 East, 62.

sued alone in tort, upon a cause of action, arising out of, or concerning *real property* held jointly, or in common, by himself and another. In this case, the nonjoinder of the other tenant is pleadable in abatement, although the action sounds in *tort*.(p)

When a suit is defeated, by a plea in abatement, for the nonjoinder of another person, who should have been made a co-defendant; the latter may in a subsequent action for the same cause, and in which he is made such, plead in abatement, that still another ought to have been sued.(q) And in case of several successive suits for the same cause, *each new* defendant disclosed in the next preceding suit, by a plea in abatement, may plead, in the same manner, that another, still, should have been joined, as defendant.(r) For the new defendant cannot be deprived of his right thus to plead by the omission of the defendant or defendants, in the prior suit to disclose the names of *all* those, who ought to have joined in it. And the same rule holds, throughout any series of actions in which new joint contractors are successively disclosed.(s)

But the same defendant, who, in a prior suit, has pleaded the nonjoinder of *one* joint contractor cannot plead, when afterwards sued on the same contract as co-defendant with the latter, that there is still *another* joint contractor, who should have been made defendant.(t) This he is *estopped* to do, by his plea, in the preceding suit: for he ought, by his plea in *that* suit, to have "given the plaintiff a *better writ*," by naming *all* the joint contractors.

(p) 5 T. R. 651; 1 Saund. 291, e. (n. 4.); 2 Black. Com. 182; Com. Dig. *Abatement*, F. 6.

(q) 3 East, 70-1.

(r) *Ib.*

(s) This rule must still hold good, in New York; whether this kind of defense be taken by demurrer, or by answer. The defendant thus brought in, may himself demur, or answer.

(t) *Ib.*

6. THE PENDENCY OF A PRIOR SUIT FOR THE SAME CAUSE.

It is in general, a good plea in abatement, that there is a prior action, (similar, or concurrent), pending between the same parties, for the same cause.(u) For the law, which "abhors a multiplicity of suits," will not permit a defendant to be harrassed, by two or more actions for the same thing, where a complete remedy might be obtained by one of them. The object of the rule is to prevent *vexation*.

To give effect to this plea, it is not necessary that both suits be of the *same kind*: it is sufficient for this purpose, that they are *concurrent*.(v) Thus, in *replevin*, it is a good plea in abatement, that a prior action of *trespass*, for the same taking, is depending. And when trespass and trover are *concurrent*, the pendency of one when the other is brought, is pleadable in abatement of the latter.(w) For the *vexation* is the same, as if both suits were of the same kind. And the identity of the cause of action, in the two cases, may be shown by *averment*.

(u) Thel. Dig. 270; Com. Dig. *Abatement*, H. 24; Bac. Abr. *Abatement*, M.; 5 Co. 61-2; Doct. Pl. 10, 67. [*Bryan v. Scholl*, 109 Ind. 367. This reason must be so pleaded that plaintiff may have an opportunity to reply. *Breckon v. Ottawa Circ. Judge*, 109 Mich. 615.

Perhaps the same subject-matter is equivalent to the "same cause." *Berger v. Moessinger*, 5 Ohio Cir. Ct. 432. Under the codes this cause is pleaded in the answer in the nature of a plea in abatement because generally it does not appear on the face of the complaint. *Hurst v. Everett*, 21 Fed. 218; *Berger v. Moessinger*, *supra*. And unless so pleaded before trial pendency of the other action is waived. *Smith v. Spaulding*, 40 Neb. 339.

The defendant may state the pendency and object of the former suit and aver that the present suit was brought for the same matters; or he may omit the averment that the suits are for the same subject-matter and state sufficient facts to show that they are so. *Davison's Ex'rs v. Johnson*, 16 N. J. L. 112].

(v) *Id*.

(w) Bac. Abr. *Abatement*, M; Hob. 184; Hutt. 3; Doct. Pl. 10; Com. R. 595.

But where the cause of action is not *the same* in both suits, the pendency of the first will not abate the second. (x) Such a case is not within the reason, or even the terms, of the above general rule. Hence, in debt on a bond secured by mortgage, the pendency of a prior action of *ejection*, for the land mortgaged, is no cause of abatement. (y)

It is immaterial whether the first suit is pending or not, at the time of the defendant's *pleading* in abatement of the second. If the first was pending, when the second was *commenced*; the latter may be abated, as being *vexatious ab initio*. (z) And on principle, it seems, that this plea can never prevail, except in cases where the latter suit is *vexatious*.

Hence, where it appears that the first action must have been *ineffectual*, the courts of Connecticut have often determined that its pendency shall not abate the second (a): because in such a case, the latter is not *vexatious*.

The plea of a prior suit pending, for the same cause, is good, although there be a *new* defendant added in the second: as where the first action is against *A. only*, and the second against *A. & B.* (b) And by the opinion of three judges,

(x) 5 Co. 61-2; Hob. 184; Com. Dig. *Abatement*, H. 24 [Merritt v. Richey, 100 Ind. 416.]

Though strictness is required in pleas in abatement, yet, where no reasonable doubt exists as to the identity of suits, the plea is good. *O'Brien v. Alpena Circuit Judge*, 106 Mich. 42.

In pleading the pendency of an attachment suit the amount of the debt garnished must be stated and the name of the person in whose favor the levy is made. *Sheely v. Toole*, 56 Ga. 210; *Clark v. Marburg*, 33 Kan. 471].

(y) Doug. 417; 2 Atk. 344; Pow. on Mortg. 417.

(z) Doct. Pl. 10; Bac. Abr. *Abatement*, M; 3 Inst. Cler. 118; Gilb. H. C. P. 255-6; *Com. v. Churchill*, 5 Mass. 177. [*Nelson v. Foster*, 5 Bliss. 44].

(a) 1 Root, 355, 562.

(b) Carth. 96-7; Comb. 144; 1 Show. 75; Ham. N. Prius, (Am. ed.) 96; Hob. 137.

(*Holt*, Ch. J. doubting), it was held that the second suit must abate, as to *both* defendants.(c)

And when on the other hand, one of two or more defendants, in the first action is *omitted* in the second—(as if the first action is against A. & B. and the second against A. *only*)—it seems manifest that the second must abate: the case being plainly within the reason of the general rule.

On a writ of *partition*, the defendant may by the common law, plead in abatement the pendency of a prior writ of the same kind, brought by himself against the *plaintiff* in the second, for a partition of the same land (d): because the same end, which the plaintiff in the second suit seeks to attain, may be fully attained in the first.—But since the statute 8 & 9 W. III, c. 39, there can be *no plea in abatement* in any suit for partition of land.(e)

(c) Where the liability of the defendant is several, as well as joint, (as in an action for a joint *tort*), *qu.* whether the second action ought, on principle, to abate *quoad the new* defendant. For *he* is not, in fact, subjected to vexation by the second suit; and the action is, by the supposition, of such a nature as might be prosecuted against himself alone. Such, however, was the action, in the case referred to, in the text. Was not *Ld. Holt's* doubt, then, well founded?

(d) *Gilb. H. C. P.* 260; *Bac. Abr. Abatement*, M. Dy. 92. b. *Cont.* 1 *Brownl.* 158.

(e) 2 *Lill. Ab.* 357; 3 *Black. Com.* 302.

By the English law, the pendency of a prior action, in an *inferior* court, is not pleadable in abatement of another, brought in one of the Superior Courts of Westminster. 5 Co. 62; *Bac. Abr. Abatement*, M; 2 *Wils.* 87; *Com. Dig. Abatement*, H. 24. This rule seems to have originated in the general authority of the latter courts to *supercede* the jurisdiction of the former, upon the application of defendants in the inferior courts.

From the language of Ch. J. *Eyre* (*Fitzg.* 313), it might perhaps be inferred, that the reason of this exception to the general rule is the presumed *want of jurisdiction* in the inferior court. (See also 1 *Chitt. Pl.* 443, n. r.) But upon this supposition, there would seem to be no propriety in limiting the exception to prior suits in *inferior* courts; since a prior suit, pending even in a *superior* court, not having *jurisdiction* of it, would, on principle, afford no cause for

It is no cause for abating an *indictment*, that a prior indictment is pending against the defendant, for the same offence. Because the court, in the exercise of its *discretionary control* over prosecutions by indictment, may *quash the first*. (f) The same is true of *informations for crimes* filed *ex officio*, by a prosecuting officer. (g)

But this rule does not extend to the case of two informations *qui tam*, &c. for the same offence. For on such an information, the situation and rights of the prosecutor are analogous to those of the plaintiff in a civil suit; and the court has, therefore, no such discretionary power over them, as it exercises over indictments. (h)

7. DEFECTS IN THE WRIT.

In general, any *irregularity, defect or informality*, in the terms, form, or structure of the writ, or in the mode of issuing it is a ground of abatement. (i)

The defects or mistakes which fall within this general description, are quite multifarious, and hardly admit of an explanation in detail. Among those usually enumerated, are any *uncertainty or repugnancy*—want of *date*, or an impos-

abating a second suit for the same cause in any other court. Upon the same supposition, an allegation of jurisdiction in the inferior court would seem to make the plea good.

[It is necessary to show in what court the action is depending, for if it be not in some one of the superior courts, but in a court of inferior jurisdiction, it is not pleadable in abatement. *Brastow v. Barrett*, 82 Me. 166; *Polsey v. White Rose Man. Co.*, 19 R. I. 492; *Berger v. Messinger*, 5 Ohio Cir. Ct. 432. So the plea must show a record].

(f) 2 Hawk. P. C. c. 34, § 1; Cro. Car. 147; Fost. 104. & seq; 2 East, 226.

(g) Doug. 240.

In New York the *finding* of the second indictment *supersedes* the first; and it *must* be quashed.

(h) 2 Hawk. P. C. c. 26 § 63; Doug. 240, (n. 1.) 2d ed.

(i) Com. Dig. *Abatement*, H. 1-6; Lawes' Pl. 106.

sible date—want of *venue*, or in *local* actions, a *wrong venue*—a *defective return*, &c. &c. (j) The return is “defective,” when the time between the date of the writ and the return-day, is too short to afford the defendant such length of *notice*, in regard to time, as the law requires. (k)

If the writ is made returnable to any other than the *first* term of the court, after it issues, when there is sufficient intervening time for its return to that term; it may for this cause be abated; but a plea in abatement, in such a case, is *unnecessary*. For the writ is *void*, and therefore liable to be set aside, *on motion*. (l)

If the sheriff's *return of service*, as indorsed by him upon the writ, is defective *upon the face of it*—(as if it appears, from his indorsement, that the defendant has not had *seasonable notice* of the suit); this is a ground of abatement, or for setting the writ aside, *on motion*. (m) But if *sufficient upon the face of it*; the defendant cannot falsify it, on a plea

(j) Com. Dig. *Abatement*, H. 1-17; Lawes' Pl. 106.

(k) Com. Dig. *Abatement*, H. 15; 2 Keb. 461; 2 Wils. 117; 6 Pick. 370.

(l) 3 Wils. 341; 2 Salk. 700; 1 Root, 315, 316; 5 Mass. 100.

It is necessary to the protection of the defendant, that the writ should be considered as *void* and not as *merely abateable*. If the rule were otherwise, no advantage could be taken of the irregularity, until the arrival of the term, to which it is made returnable—which might be at any future term, however remote; the defendant might consequently be held to bail, or imprisoned, during the whole intermediate period. But the writ being *void*, all acts done in obedience to it, are so: and the defendant, if arrested under it, is entitled to an immediate discharge.

The rule of law is well settled, that no *motion* to abate the suit, or to dismiss the action, can be sustained, except for some matter apparent on the record. *Nye v. Liscombe*, 21 Pick. 263; *Rathbone v. Rathbone*, 4 id. 89; *Guild v. Richardson*, 6 id. 369. If the matter does not appear on the face of the record, the defendant must allege it by plea, that it may be traversed, put in issue and tried, if it is not admitted by a demurrer. *Simonds v. Parker*, 1 Met. 511; *Jacobs v. Mellen*, 14 Mass. 135; *Amidown v. Peck*, 11 Met. 467.

(m) Com. Dig. *Abatement*, H. 15; 2 Wils. 117.

in abatement; and his only remedy is an action against the sheriff, for a *false return*.⁽ⁿ⁾ For it is a general rule of the common law, that such *official* acts shall not be falsified, except by a proceeding, to which the *officer* is a party, and which is commenced for the *direct* and *express* purpose of falsifying it.

In the State of Connecticut, however, if the service is *actually defective*, the defendant has always been allowed to *prove* it so, under a plea in abatement, even in *contradiction* of the officer's indorsement.

8. THAT THE ACTION IS MISCONCEIVED, IS PLEADABLE IN ABATEMENT.

For example if *assumpsit* is brought, when *account* is the only proper remedy; or *trespass*, when *case* is the proper action.^(o) But a plea in *abatement*, for this cause, is un-

(n) 2 Stra. 813; T. Jon. 39; 1 Black. R. 393; Com. Dig. *Retorn*, G; *Slayton v. Inhabitants of Chester*, 4 Mass. 478; *Pullen v. Haynes*, 11 Gray, 379.

No rule of law is better settled than this, that the return of an officer, as to all matters which are properly the subject of his return, is conclusive, so far as it affects parties and privies to the returned process. Their only remedy for a false return is by action against the officer. *Bott v. Burnell*, 11 Mass. 165; *Winchell v. Stiles*, 15 id. 230; *Bean v. Parker*, 17 id. 601; *Tilden v. Johnson*, 6 Cush. 358; *Pullen v. Haynes*, 11 Gray, 379; *Woodward v. Munson*, 126 Mass. 104.

A sheriff's return, though it be conclusive evidence in the particular cause in which it is made, or for the purposes of an attachment, does not operate as an estoppel in any other action or proceeding, either as against the sheriff or as against his deputy. *Stanish v. Ross*, 3 Exch. 527; *Jackson v. Hill*, 10 A. & E. 477; *Remmet v. Lawrence*, 15 Q. B. 1004; *Stimson v. Farnham*, L. R. 7 Q. B. 175. And a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account and toward the satisfaction of the debt mentioned in the writ. *Holmes v. Clifton*, 10 A. & E. 673.

(o) Com. Dig. *Abatement*, G. 5; 1 Show. 71; Hob. 199; Lawes' Pl. 106; Tidd, 579.

necessary and unusual. For if the mistake appears upon the face of the declaration, it is fatal on *demurrer*; and if not, advantage may be taken of it under the *general issue*.

9. NON ACCRUAL OF RIGHT OF ACTION.

That *the right of action had not accrued*, at the commencement of the suit, may be pleaded in abatement (*p*): as, when an action on contract is commenced, *before* the time, appointed for performance. This plea also is seldom used, and for the same reason, as is mentioned under the last head.

The foregoing enumeration of pleas in abatement comprehends all the principal causes or grounds of abatement, known to the common law. (*q*)

PLAINTIFF'S PROCEDURE.—When a plea in abatement is true, in point of fact, and sufficient in law, (in which case the writ must abate), the *plaintiff* may—in order to prevent unnecessary delay and expense—enter a *cassetu breve*, or

(*p*) 2 Lev. 197; Benl. 57; Cro. Eliz. 325; Hob. 199; Com. Dig. Action, E. 1.

(*q*) What are here called pleas in 'abatement,' without further discrimination, comprehend all those pleas, which, under the more minute and complex classification of dilatory pleas, presented in the first part of this chapter, follow pleas to 'the person of the *plaintiff*.' And the nine foregoing kinds, or classes, of plea in *abatement*, enumerated in the present chapter, are under that more minute classification, denominated as follows:—1. The plea of *coverture* of the defendant, and that of the *death* of a party, are pleas 'to the *person*'—i. e. the person of the defendant, in the first case, and of either party, in the second.—2. The plea of *variance* between the count and the writ, or between the writ and the instrument, &c., declared on, is a plea 'to the count'; (as all writs were formerly recited at full length in the *count*.) 3. The pleas of *misnamer*, want of *addition*, &c.—of *nonjoinder* or *misjoinder* of parties, and pleas founded on any *repugnancy*, *defect* or *informality*, upon the face of the writ, are pleas 'to the *form* of the writ.'—4. The plea of a *prior suit* pending for the same cause—that the action is *misconceived*—or that the suit was commenced before the right of action had accrued, is a plea, 'to the *action* of the writ.'

cassetu billa; i. e. may pray that his writ or bill may be *quashed*, to the intent, that he may sue out a better writ, or exhibit a better bill, for the same cause. (r) And judgment will, of course, be entered according to his prayer. Whenever the defect is such as cannot be amended, this is the more eligible course for the plaintiff.

There is also another mode in which the plaintiff may, in general, after a plea in abatement, and in most other stages of the suit, put an end to his own action, in whole, or in part; viz. by entering a *nolle prosequi(s)*—which is an entry upon the record, that he will not further prosecute the suit against the defendant, in respect either to the *whole*, or some *part*, of his alleged cause of action.

(r) Lawes' Pl. 166; 7 T. R. 698; *Gardner v. Walker*, 3 Anst. 935; Tidd, 633; 1 Chitt. Pl. 454; 2 Ib. 590.

(s) Lawes' Pl. 166; Tidd, 617, 620-1; *Milliken v. Fox*, 1 Bos. & P. 157. *Vide* 1 Peters, 74, *et seq.*

CHAPTER V.

OF THE MODE OF PLEADING IN ABATEMENT AND THE EFFECT OF THE PLEA. (a)

IF matter of mere abatement is pleaded in *bar*; or if matter, which goes only in bar, is pleaded in *abatement*; the plea in either case, is ill. (b) For otherwise, all distinction between these different classes of pleas would be confounded. In the former case too, judgment *in chief* must be given for the plaintiff (c); since the plea, which is necessary ill, is to *the action*. There are, however, as has before been shown, certain defences, which are good, either in abatement or in bar; and to these the above rule is, of course, inapplicable. (d)

A plea in abatement, for matter *apparent* upon the face of writ, should, in general, both *begin* and *conclude*, by praying 'judgment of the writ,' (or 'of the writ and declaration,') and that the same may be quashed: but where the cause of abatement is *extrinsic*, the plea, it is said, should not *begin*, but only *conclude*, with this prayer. (e) The precedents,

(a) The great degree of *certainly and accuracy*, required in dilatory pleas of all kinds, has been before explained. The rules on this subject need not, therefore, be here repeated.

(b) Com. Dig. *Abatement*, I, 12, 14; *Holland v. Rothmar*, 4 T. R. 227; 2 Saund. 209, c. d. (n. 1.); *Justice v. Whyte*, 1 Mod. 239; [*Harvey v. State*, 94 Ind. 159; *Mattell v. Conant*, 156 Mass. 418. A party setting up a plea in bar in a plea in abatement waives the plea in abatement. *Hougland v. Dent*, 52 Mo. App. 237].

(c) *Cross v. Bilson*, 2 Ld. Ray. 1020; *Nowlan v. Geddes*, 1 East, 634.

(d) Under the New York Code, where a demurrer *can* be taken, it *must* be; and an *answer*, upon matter which should have been demurred to, is ill. *Zabriskie v. Smith*, 13 N. Y. 336; *Ingraham v. Baldwin*, 12 Barb. 9; *Baggott v. Boulger*, 2 Duer, 160.

(e) Lawes' Pl. 108-9; Com. Dig. *Abatement*, I, 12; 2 Saund. 209, a., d. (n.); 2 Chitt. Pl. 415; Tidd, 577, 584; 3 Black. Com. 303.

however, do not all appear to conform to this distinction. (f) If the action is by *bill*, the plea should, in like manner, pray 'judgment of *the bill*.' (g)

When the plea goes to the *persons* of the defendant, (as if it be, that she is a *feme covert*), the form of praying judgment is, 'whether the defendant ought to answer'—or 'ought to be compelled to answer.' (h) It being rather the *personal privilege* of the defendant, than any fault in the writ itself, that constitutes the ground of exception.

Any mistake, in the former of *beginning or concluding* a plea in abatement is fatal to the plea. (i) Great accuracy is therefore required, in these two, as well as in all other particulars. Upon these two, indeed, depends the *character* of the plea, as distinguished from a plea to *the action*.

The character of a plea depends, regularly, upon the form of its *commencement and conclusion*: or (which is the same thing), upon the nature of the *judgment* which it prays, in its commencement and conclusion. So that if these are *alike* (both in abatement, or both in bar); they are decisive of the character of the plea, whatever may be its *matter*. (j)

If therefore, the defendant pleads matter, which goes only *in bar* (as a release), but begins and concludes *in abatement*, (as by praying judgment of the *writ*); the plea is in *abatement*. (k) And the same commencement and conclusion, which the plea requires, are to be followed in the *replication*,

(f) 1 Chitt. Pl. 451; 2 Ib. 413-420; Bac. Abr. *Abatement*, P.

(g) 2 Saund. 209, d.; Holt, 3; *Churchy v. Rosse*, 5 Mod. 144; Tidd, 577; Com. Dig. *Abatement*, I, 12.

(h) Lawes' Pl. 109; Tidd, 584; 2 Saund. 209, d.

(i) 2 Saund. 209, c. d.; 1 Chitt. Pl. 445; *Hizon v. Binns*, 3 T. R. 185; *King v. Inhabitants, &c.*, 1 B. & A. 173. [*Settle v. Settle*, 10 Humph. 504].

(j) *Medina v. Stoughton*, Ld. Ray. 593; *Crosse v. Bilson*, Id. 1019, Bac. Abr. *Abatement*, P.; Latch. 178; 2 Saund. 209, c. d. (n. 1.); Lawes' Pl. 107; Tidd, 583-4.

(k) Id.; *Godson v. Good*, 6 Taunt. 587.

rejoinder, &c. until an *issue* is tendered; and those, tendering an *issue*, require the same *commencement*.

And on the other hand, if the matter pleaded goes only *in abatement*, (as *misnomer*, or any informality, in the *writ*), but begins and concludes *in bar*; the plea is *in bar*.⁽¹⁾

But when the beginning and conclusion of the plea *differ*, (the former being *in abatement*, and the latter *in bar* or *e converso*), there is some confusion in the books—not indeed as to the *legal* sufficiency of the plea, which is ill of course, by reason of the discrepancy—but as to the effect of the discrepancy, upon the *character* of the plea, and consequently upon the mode of *answering* it, and the kind of judgment to be rendered upon it.

According to the weight of authority, however, the following appear to be the correct distinctions:—

When the beginning and conclusion thus differ, the *subject-matter* of the plea would seem to be the most simple and most obvious criterion of its character. And such is the established rule, when the application of this criterion would favor the *plaintiff*; though it is otherwise, when the same criterion would operate in favor of the *defendant*: a distinction, derived from the policy of discouraging *dilatory* pleas.

Thus if matter, which goes only *in bar*, begins in *abatement* and concludes in *bar*—or *e converso*; it is a plea in *bar* (*m*), by reason of its *subject-matter*—and being ill, by reason of the discrepancy between its commencement and conclusion; the plaintiff, by demurring as *in bar*, (i. e. by concluding his demurrer, with a prayer of judgment *in chief* for his *debt*, or *damages*), is entitled to *final* judgment upon it.

So also, if matter, which goes only in *abatement*, begins in

(1) *Burden v. Ferrers*, 1 Sid. 189, 190.

By a plea 'in abatement,' in these distinctions, regarding the different characters of pleas, is meant a *dilatory* plea of any kind.

(*m*) *Medina v. Stoughton*, Ld. Ray. 593; *Crosse v. Bilson*, Id. 1018; 2 Saund. 209, c. d. (n. 1.); *Crosse v. Bilson*, 6 Mod. 103.

bar, and concludes in abatement, or *e converso*; the plaintiff may demur, as *in bar*. (n) And if he thus demurs, he entitles himself to *final* judgment. (o) But if issue is joined, on such a plea, and found for the *defendant*; the judgment will be, as on a plea in *abatement*, viz. that the writ be quashed; though if the same issue were found for the *plaintiff*, he would be entitled to judgment *in chief*. (p)

If a plea of matter, which goes indifferently either in bar or in abatement, differs in its commencement and conclusion; the plaintiff may, with equal propriety, demur to it, either as in bar, or in abatement. (q) For the beginning and conclusion *neutralize* each other, as regards the character of the plea; and its *subject-matter*, (as it may operate either way), furnishes no criterion. The judgment will therefore follow the nature of the *prayer*, with which the demurrer concludes. It is obvious, then, that the course, most advantageous to the plaintiff, is to demur to the plea, as *in bar*; as by thus demurring, he will entitle himself to judgment *quod recuperet*.

On a judgment rendered upon any *dilatory* plea, *error* may be assigned, as well as upon a final judgment. But matter of mere abatement, if *not pleaded* in abatement, cannot be assigned for error. (r) For if not thus pleaded, it is *waived*—as it would be unreasonable that a suit should be defeated,

(n) 1 Chitt. Pl. 446, 456-7; 2 Saund. 209, d. (n. 1.); *Nowlan v. Geddes*, 1 East, 634; *Schoonmaker v. Elmendorf*, 10 Johns. 49.

(o) The rule, allowing the plaintiff to demur in this manner, originated in the same anxiety of courts of justice to *discourage* dilatory pleas. Were it not for this reason, the *matter* of the plea would determine its character, as under the last preceding rule.

(p) 1 Chitt. Pl. 446; *Nowlan v. Geddes*, 1 East, 634; 2 Saund. 209, d. (n. 1); *Crosse v. Bilson*, 2 Ld. Ray. 1018.

(q) Bac. Abr. *Abatement*, P.; *Putt v. Nosworthy*, 1 Vent. 136; *Bisse v. Harcourt*, 3 Mod. 281.

(r) *Gravenor v. Stephens*, 10 Mod. 166; *Addison v. Overend*, 6 T. R. 766; *Rawlins v. Vincent*, Carth. 124; Com. Dig. *Abatement*, I, 36; *Earl of Lonsdale v. Littleddale*, 2 H. Black. 267, 299; Bac. Abr. *Error*, K. 5.

in its latter stages, by an exception, which might have been taken *in limine*. Example: Count having an impossible date.

For a similar reason, it is an established rule, that to a *scire facias*, or debt on *judgment* the defendant is not allowed to plead in abatement, (nor indeed in bar), any thing, which he might have pleaded in the original action.(s)

A defendant cannot 'demur in abatement.'(t) This rule appears, from the application of it in the books, to have two different meanings, or to be applied in two different senses: a. That the defendant cannot *demur*, for defects or mistakes in the *writ* (u): b. That he cannot plead *in abatement*, for the insufficiency of the *declaration*.(v) The former he cannot do, because a demurrer never reaches the *writ*; nor the latter, because no advantage can be taken of insufficiency in the *pleadings*, by a plea *in abatement*. And on the plaintiff's joining in the demurrer, in the one case, or demurring to the plea, in the other, *final judgment* will be given in his favor.(w)

Although, as we have seen, the prayer of a *wrong judgment*, in the conclusion of a plea, makes the plea faulty; yet a mere prayer of judgment, not specifying any particular *kind* of

(s) Bac. Abr. *Abatement*, O; 1 Salk. 2; *Rock v. Leighton*, Id. 310, *Ramsden v. Jackson*, 1 Atk. 292; *Earle v. Hinton*, 2 Stra. 732; *Skelton v. Hawling*, 1 Wils. 258; 1 Saund. 219, c. (n. 8.); Co. Litt. 303.

(t) Bac. Abr. *Abatement*, P; *Dockminique v. Davenant*, 1 Salk. 220; *Rayner v. Pointer*, Willes, 410; *Bullythorpe v. Turner*, Id. 479; *Winter v. Garlick*, 6 Mod. 195; *Dockmanny v. Davenant*, Id. 198; *King v. Haddock*, Andr. 147.

(u) Plowd. 73, n.; *Dockmanny v. Davenant*, 6 Mod. 198. It was formerly held otherwise. *Wimbish v. Willoughby*, Plowd. 73; *Vernon v. Stanley*, Dy. 341.

(v) Plowd. 73, n.; *Rayner v. Poynter*, Willes, 410; *Bullythorpe v. Turner*, 479; Lawes' Pl. 172; Gilb. H. C. P. 259.

(w) *Wimbish v. Willoughby*, Plowd. 73, n.; *Dockmanny v. Davenant*, 6 Mod. 198; Willes, 411.

But if a prisoner, indicted of a *capital* offence, demurs in abatement; the judgment is only a *respondeat ouster*, (2 Hawk. P. C., c. 31, § 6): a rule founded on the benignity of the law *in favorem vitæ*.

judgment, is sufficient. (x) For it is the duty of the court to render such a judgment as the *legal effect* of the pleading requires.

A writ may be abated as to *part* of what the plaintiff demands, and stand good for the residue. (y) Thus, in debt on two bonds, or assumpsit on two promises, the defendant may plead, as to *one* of them, the nonjoinder of a co-obligor, or co-promissor, and thus the writ, *quoad* that one bond or promise *only*. And a judgment, thus abating the writ *in part*, may be given on a plea, praying that the *whole* may be abated (z): it being the duty of the court to give the plea its proper effect, if the judgment prayed is of the *right kind*.

As a plea in abatement does not go to the *merits* of the cause; a judgment upon it does not, in general, conclude either party, *quoad the cause of action*, and is therefore *no bar* to a subsequent action, for the same cause. (a) The general principle, upon which a prior judgment bars a subsequent action, being, that the *merits* of the controversy have been already decided in the former suit.

But the above rule does not hold, when the judgment upon a plea in abatement goes *in chief* as, in some cases, it does. (b) For such a judgment on any plea is, in its nature, conclusive as to the *right of action*.

As to the *judgment* to be rendered on pleas in abatement, the distinctions are the following:—

a. If the plea is determined in favor of the *defendant*, upon an issue either in law or fact; the judgment is, that the writ,

(x) *Barnes v. Gladman*, 2 Lev. 19; 1 Saund. 97; *Rayner v. Pointer*, Willes, 410, 411; *Le Bret v. Papillon*, 4 East, 502, 509.

(y) Lawes' Pl. 106–7; 2 Saund, 210, a. (n. 1.); *Powell v. Fullerton*, 2 Bos. & P. 420; Com. Dig. *Abatement*, N.; Bac. Abr. *Abatement*, L.

(z) *Id.*

(a) Com. Dig. *Action*, L. 4.; Bac. Abr. *Pleas*, &c., I. 13; 4 Co. 43, a; 6 Ib. 7, 8; 8 Ib. 37, b. 98; *Earl of Montague v. Lord Preston*, 2 Vent. 170.

(b) *Id.*

(or, as the case may be, the bill), be *quashed*. (c) And this judgment, though it does not decide the *right of action*, puts an end to the suit; unless the mistake, on which the plea is founded, may be, and is, corrected by amendment—in which case, the amended writ, (or bill), becomes a new one, and the suit may then proceed.

b. If the plaintiff prevails, on a *demurrer* to the plea; the judgment is *interlocutory*, viz. a *respondeat ouster*—that the defendant answer over (d); under which judgment, he may plead any plea, *subsequent* (in the order of pleading) to that, which has been overruled.

c. If an issue in *fact* is joined on a plea in abatement, and found for the *plaintiff*; *final* judgment is awarded in his favor (e): a rule, which extends to all *dilatory pleas*. (f)

(c) Bac. Abr. *Abatement*, P.; *Thompson v. Collier*, Yelv. 112; [*Blackburn v. Watson*, 85 Pa. St. 241].

(d) 2 Saund. 211 (n. 3.); *Thompson v. Collier*, Yelv. 112; Bac. Abr. *Abatement*, P.; 3 Black. Com. 303; Anon. 1 Vent. 22; *Putt v. Nosworthy*, id. 137.

(e) Com. Dig. *Abatement*, I, 115; *Parke v. Eliason*, 1 East, 544; 2 Wils. 368; *Wilkinson v. Boulton*, 1 Lev. 163; Anon., 1 Vent. 22; *Thompson v. Collier*, Yelv. 112; *Jones v. Azen*, T. Ray. 119; *Levins v. Randolph*, 1 Ld. Ray. 594; 2 Saund. 211. (n. 3.) [See *Young v. Gilles*, 113 Mass. 34; *Parks v. Smith*, 155 Mass. 26; *Simpson v. Railway Company*, 89 Tenn. 304].

(f) This rule does not extend to the case of indictments for *capital* offences. In such cases, if an issue in fact, joined on a plea in abatement, is found *against* the prisoner; the judgment, (*in favorem vitæ*), is a *respondeat ouster*, so that he is still permitted to plead to the *merits*, (2 Hawk. P. C. c. 23, § 128; *King v. Gibson*, 8 East, 107.)

The object of the rule appears to be, to discourage *false dilatory pleas*.

In the State of Connecticut, the Supreme Court of Errors, in the year 1818, recognized the following distinction, as established by the ancient usage of the State: viz., If an issue in fact, joined on a plea in abatement, is tried by the *jury*, and found for the plaintiff; *final* judgment shall be given for him; but if the issue is tried by the *court*, (as, by the statute-law of the State, it may be, with the mutual consent of the parties); the judgment shall be a *respondeat ouster*—a distinction, for which it seems difficult to assign any satisfactory reason.

DIVISION V.

OF PLEAS TO THE ACTION.

CHAPTER I.

OF THE GENERAL ISSUE, AND SPECIAL ISSUES; INCLUDING ALSO IMMATERIAL AND INFORMAL ISSUES.

ISSUES IN GENERAL.—An *issue*, in pleading, is defined to be a *single, certain and material* point, issuing out of the allegations of the parties, and consisting, regularly, of an *affirmative* and *negative*. (a) The word ‘*issue*,’ (*exitus*), in the sense in which it is applied to pleading, signifies *end, termination or conclusion* (b); and is thus applied, because an issue brings the pleadings to a *close*.

The above definition comprehends, as well issues in *law*, as in fact. As to the former, however, nothing further need be observed at present, than that when an issue in law is said to consist of a *single* point, the proposition does not mean that such an issue involves, necessarily, only a *single* rule or principle of law—or that it brings into question the legal sufficiency

(a) Co. Litt. 126, a.; Com. Dig. *Pleader*, R.; Bac. Abr. *Pleas*, &c., G. 1; *Simonton v. Winter*, 5 Peters, 149.

This definition describes a *good* issue. But when a direct affirmative and negative are predicated of an *immaterial* fact, they form what is called, in law, an *issue*, though a bad one, as being *immaterial*. An issue in law, however, can never be immaterial: since it reaches back through *all* the pleadings, and puts their sufficiency, (in point of substance, at least) in issue. *Vide Demurrer*.

(b) 3 Black. Com. 314; Finch's Law, 396.

of a *single fact* only: the meaning of it is merely, that an issue in law reduces the whole controversy to the single question, whether the facts confessed by the issue, are *sufficient in law* to maintain the action, or the defence, of the party who alleged them—instead of leaving the controversy, (as is done in most courts, under any other system of jurisprudence than that of the common law), open to a discussion *at large*, of all the various matters of both fact and law, which may, on each side, be brought to bear upon the cause. The *singleness* of issues in *fact*, (as will appear hereafter), admits of a similar explanation.

According to the strict original rule of the common law, every issue in fact, (with the exception of one or two anomalies), must consist of a *direct* affirmative allegation, on one side, and a *direct* negative, on the other. (c) For of two affirmatives, or two negatives, though *inconsistent* with each other, the latter denies the former only *argumentatively*; and argumentative pleading, as has been shown before, is not allowable. Thus if a defendant pleads that his co-defendant is *dead*; a replication that he is '*alive*,' does not form a proper issue—for the reason just assigned. (d) The replication should be, that the co-defendant '*is not dead*;' or, 'that he is alive, *without this*, that he is dead'—a form of negation, to be explained hereafter, under the head of *Traverse*.

In one or two modern cases, however, the above rule has been somewhat relaxed. Thus where the defendant pleaded that he was born in *France*, a replication that he was born in *England*, was held to form a good issue (e): and it is said, in the report last cited, to be sufficient, 'if the second affirmative is *so* contrary to the first, that the first cannot, *in any degree*, be true.' Any relaxation of the original rule tends, however,

(c) Co. Litt. 126, a.; 2 Black. Rep. 1312; *Hodgson v. East India Co.*, 8 T. R. 278; Bac. Abr. *Pleas*, &c., G. 1; *Simonton v. Winter*, 5 Peters, 149.

(d) Sav. 86; *Fortescue v. Holt*, 1 Vent. 213.

(e) *Tomlin v. Burlace*, 1 Wils. 6; *Tomlin v. Purkis*, 2 Stra. 1177.

in some degree, to looseness and uncertainty in the formation of issues; and breaks in upon that *simplicity* and uniformity in their structure, which it is important to preserve. And it may be added, that no relaxation of the rule appears to be demanded, either by necessity or convenience; since a strict conformity to it is, of all modes of producing a regular and precise issue, the most natural, simple and easy.

One original exception to the above general rule, as to the formation of issues, occurs in the instance of a *writ of right*. The general issue to the count upon that writ, is, and ever has been, formed by *two affirmatives*: the averment on one side being, that the demandant has greater right than the tenant; and on the other, that the tenant has greater right than the demandant—or, (more precisely), the demandant ‘demands’ the tenements as his right and inheritance; and the tenant, by way of denial, ‘prays recognition to be made, *whether* he himself, or the demandant, has greater right,’ &c.(f) But by reason of the irregular and imperfect form of this plea, it is technically called, ‘the *mise*,’ as distinguished from general ‘issues,’ strictly so called.(g)

The other anomalous issue, before referred to, occurs in the general plea of denial, to a count in *dower*; which, to the extent of the interest demanded, is strictly analogous to a count upon a *writ of right*.(h) The count in dower merely ‘demands the third part of — acres of land, &c., *as the dower*’ of the demandant ‘of the endowment of J. S., heretofore her husband,’ &c.; and the general issue is, that J. S. was *not seised* of such estate, &c., that *he could endow* the demandant thereof, &c., (i): a mode of negation, that is merely *argumentative*.

These two anomalies appear to form the only original excep-

(f) Lawes' Pl. App., 232-3; 3 Black. Com. 195-6, 305; Ib. App. No. I, § 6; 2 Stra. 1177; 3 Chitt. Pl. 652.

(g) Id.

(h) 3 Black. Com. 183.

(i) 2 Saund. 329, 330; Stearns' Real Actions, 473, 475.

tions to the general rule, that every issue must consist of a *direct* affirmative, and a *direct* negative. And the only reason for these exceptions would seem to be, that they are conformable to the ancient precedents.

An issue in fact, taken upon the declaration, is either *general* or *special*. The former is called the *general issue*; the latter, a *special issue*.(j) Some respectable authorities, however, add a *third*, which they denominate a *common issue* (k)—a name given to no other than the single plea of *non est factum*, when pleaded to an action of *covenant broken*.

The *general issue* denies all the material allegations in the declaration (l); by which are meant all those, which the

(j) Co. Litt. 126, a; Bac. Abr. *Pleas*, &c., G. 1.

(k) Tidd, 598; Lawes' Pl. 110, 113. *Vide Hodgson v. East India Co.*, 8 T. R. 282.

(l) Bac. Abr. *Pleas*, &c., G. 1; Lawes' Pl. 110; 3 Black. Com. 305.

[The general issue is a proper answer to any claim not well founded in fact. *Denver v. White River Boom Co.*, 51 Mich. 412.

The general issue is a denial of the whole of the plaintiff's case, and puts in issue all material averments of the complaint. *McGhee v. Cashin*, 130 Ala. 561. It carries the case to the jury, and requires the plaintiff to prove his case by a preponderance of the evidence. *Nash v. Cooney*, 108 Ill. App. 211. So it is error to strike it out and render judgment without giving the jury a chance to pass upon the evidence. *Woolfolk v. Beach*, 61 Ga. 67.

The statutory general issue is at least as broad as that at common law. *Osborn v. Lovell*, 36 Mich. 246.

The *general issue* is not allowed in some States. But a denial of the allegations of the petition, whether in a single sentence or in as many sentences as the petition contains, is specific in its nature and puts in issue every allegation of the petition. *Ocean S. S. Co. v. Anderson*, 112 Ga. 835.

An affirmative averment that facts do not exist is equivalent to a denial of their existence. *Cillery v. Preferred Acc. Ins. Co.*, 109 App. Div. 294.

In some States it is held that, while a special denial is required, a plea in the form of the old general issue may be accepted by the parties as tendering issue, but its scope will not be extended beyond what it was obviously intended to reach. *Hecht & Imbden v. Coughron*, 46 Ark. 132.

And under the Connecticut Practice Act a general denial is per-

plaintiff may be required to *prove*: or, (more precisely), it *enables* the defendant to contest all such allegations, in evidence; and actually puts the plaintiff upon the proof of all, or any of them, which are thus contested. A *special* issue denies only some particular *part* of the declaration, which goes to the *gist* of the action. (*m*) This distinction, between *general* and *special* issues, applies only to those, which are tendered upon the *declaration*: an issue, joined upon any of the pleadings which *follow* the declaration, being called simply, 'an issue,' without further description.

THE GENERAL ISSUE.—Though this plea denies all that is material in the declaration; the denial is not usually expressed in the *precise terms* of the allegations denied; but by a shorter, and more simple *formula*, which is tantamount to a specific and literal negation of all and each of them. Thus in the action of trespass—however numerous the acts complained of may be—the general plea of 'not guilty,' (i. e. that the defendant is *not guilty* of the said trespasses, &c. or of any part thereof), is equivalent to an allegation that he *did not*, with force and arms and against the peace, commit this, or that, or the other

missible only when it is intended in good faith to controvert all the allegations of the complaint. *Greenhal v. Lincoln, Seyms & Co.*, 67 Conn. 372.

Matters in avoidance are not admissible under a general denial, since an affirmative defense must be pleaded. *Greenhal v. Lincoln, Seyms & Co.*, *supra* *Kellogg v. New Britain*, 62 Conn. 240.

The denial on information and belief is allowed that the defendant may not be taken as admitting allegations which he cannot in good faith deny positively. It puts the plaintiff to the proof of the allegations to which it applies as though a denial had been interposed. *Sayles v. Fitzgerald*, 72 Conn. 391, 396.

A *special defense that is equivalent to the general issue* is not to be pleaded. *Nolan v. New Britain*, 69 Conn. 683.

The proper form of general issue must be used. Thus, *non est factum* means nothing in an action of debt on simple contract (*Gebhart v. Francis et al.*, 32 Pa. 78); or in an action of assumpsit brought on interest bonds (*Town of Windsor v. Hallett*, 97 Ill. 204). See *infra*].

(*m*) Co. Litt. 126, a.; Lawes' Pl. 112, 113, 145.

wrong alleged, the acts complained of, or any of them. And a similar explanation might be given of all other general issues.

The general issues in the principal actions now in use, are the following:—

In personal actions *ex delicto*, in general, whether sounding in trespass or case, and whether founded on misfeasance or nonfeasance, and including *ejectment*, the general issue is, 'Not guilty.' (n) In *replevin*, the general issue is, 'Non cepit' (o): In *disseisin*, 'Nul tort, nul disseisin' (p): In *detinue*, 'Non detinet' (q): In *debt* on simple contract, 'Nil debet' (r); or against an *executor* or *administrator*, 'Non detinet' (s): In *debt* on *specialty*, 'Non est factum' (t): In

(n) Bac. Abr. *Pleas*, &c., G. 1, I. 1; 3 Black. Com. 305; App. No. II, § 4; Gilb. H. C. P. 57.

["Not guilty" was the general issue in every action founded on tort save *detinue*. *Ins. Co. v. Thornton*, 97 Tenn. 1. See also *Wilson v. Clark*, 4 N. J. L. 442. Concerning the distinction between the general issue in trespass and case, see, *Hall v. Snowhill*, 14 N. J. L. 551; *Greenwalt v. Horner*, 6 S. & R. 76.

"Not guilty" is not appropriate to the action and raises no issue in an action founded on contract. *Ins. Co. v. Thornton*, 97 Tenn. 1.]

(o) Bac. Abr. *Replevin*, I; 2 Chitt. Pl. 508.

[*Davis v. Calvert*, 17 Ark. 85. The above plea was proper in that form of *replevin* known as *replevin* in the *cepit*, and put in issue only the taking at the place stated in the declaration. In *replevin* in the *detinet* the general issue was *non detinet*, which put in issue the plaintiff's property in the goods and the detention thereof by the defendant].

(p) 3 Black. Com. 305.

(q) 2 Chitt. Pl. 495.

(r) 3 Black. Com. 305; 2 Chitt. Pl. 459; [*Roanoke v. Watson*, 41 W. Va. 788; *Fidler v. Hershey*, 90 Pa. 363; *Virginia Fire, etc., v. Buck*, 88 Va. 517.

Non assumpsit is improper. *Lancaster v. Lancaster*, 29 Ill. App. 510].

(s) Bac. Abr. *Pleas*, &c., I, 1; *Otway v. Holdips*, 2 Mod. 266; 1 Chitt. Pl. 476.

(t) Id. [See *Tedrick v. Wells*, 59 Ill. App. 657].

debt on *judgment* or *recognizance*, 'Nul tiel record' (*u*): In debt on a *penal statute*, the more appropriate general issue is *nil debet*; because it corresponds to the *form* of the action. (*v*) But as the object of the action is to enforce a penalty for an alleged *offence*; it seems that 'Not guilty' may be substituted for '*Nil debet*.' (*w*) In *covenant broken*, the general issue is the same as in *debt* on specialty—'*Non est factum*' (*x*): or at least, this is the only *general* plea, which goes in bar of the action. (*y*) In *assumpsit*, the general issue is '*Non assump-*

(*u*) 3 Black. Com. 330, 331; 2 Chitt. Pl. 488.

(*v*) *Coppin v. Carter*, 1 T. R. 462; 1 Chitt. Pl. 481; 2 Ib. 459; *Stetson v. Tobey*, 2 Mass. 522.

(*w*) Mo. 302, 914; Cro. Eliz. 257, 621, 766; Noy, 56; Bac. Abr. *Pleas*, &c., I, 1; *Coppin v. Carter*, 1 T. R. 462; *Burnham v. Webster*, 5 Mass. 270.

(*x*) 2 Chitt. Pl. 496.

(*y*) According to respectable authorities, (Tidd, 593; Lawes' Pl. 113; 1 Chitt. Pl. 482), there is, to a declaration in *covenant broken*, no general issue: since the plea of *non est factum*, which denies the deed only, and not the breach, does not put the whole declaration in issue. And therefore, it is said, that this plea, when used in this particular action, is to be called '*the common issue*.' It must indeed be admitted, that there is a difference between the effect of the plea of *non est factum*, in *covenant broken*, and in *debt* on specialty. A valid bond, or single bill necessarily creates a *present debt*; and the plea in question, by denying the deed, necessarily and *directly* denies the alleged *debt*: whereas a *covenant* does not necessarily create, in the covenantee, a right to *damages*; because a breach may never occur. And though, if there be no covenant, there can be no *breach*; yet a denial of the covenant denies the breach, only by *consequence*, and not *directly*. As however *non est factum* is confessedly a *good* plea, in *covenant broken*, and also the most general form of denial, of which the action admits; there appears to be little use in distinguishing it, by the anomalous appellation of a '*common issue*.' Indeed, the only peculiarity which distinguishes it in this action, from other general issues—viz. that it does not put the *whole* declaration directly in issue—would seem rather to bring it within the description of a *special* issue. At any rate, if it is necessary or proper to give this plea, in the action of *covenant broken*, the peculiar denomination of a *common issue*; it would seem equally so, to distinguish the same plea by the same name, when pleaded to a *special* declaration, in *debt on a penal*

sit' (z): or, when the action is against an *executor* or *administrator*, 'that the said E. F. deceased' (the testator, or intestate), 'did not undertake or promise,' &c. 'Not guilty' was also formerly held to be a proper general issue in *assumpsit*(a); because the action, being entitled '*trespass* on the case,' was deemed to partake of the nature of an action *ex delicto*. But as the action is, in substance, founded exclusively on *contract*; the last mentioned plea is not now considered as a proper answer to it; but is still held to be aided by *verdict*, as being only an *informal* issue.(b) In *debt* for *rent* on a demise, '*rien en arriere*;' (nothing in arrear), as well as *nil debet*, is a good general issue.(c) For the former plea, as well as the latter, directly denies that any rent is due; and is, therefore, a direct denial of the alleged *debt*.

But in *covenant broken* for rent, (in which the covenant itself is set out, and the action founded upon it), '*rien en arriere*,' is not a good plea (d): because it impliedly confesses both the *covenant* stated, and the *breach*, and alleges nothing in *avoidance* of either: whereas, in the preceding case of *debt* for rent, though reserved by *deed*, it is neither necessary nor usual to allege the *deed*; and if alleged, it is but *inducement*, and therefore need not be directly *answered* in pleading. And the *gist* of the action of *debt* being the mere fact of *rent in arriere*; the plea of *nil debet*, or *rien en arriere*, as it is a direct

bond. For the same reason, which authorizes its peculiar designation in the former action, exists, to the same extent, in the latter.

(z) 3 Black. Com. 305; 2 Chitt. Pl. 423; [*Berringer v. Lake*, 41 Mich. 305; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555. *Nil debet* is a nullity in an action of *assumpsit*. *Crane Bros. Mfg. Co. v. Morse*, 49 Wis. 368].

(a) Bac. Abr. *Pleas*, &c. G .2. I. 1; *Elvington v. Doshant*, 1 Lev. 142; *Marshall v. Gibbs*, 2 Stra. 1022; Esp. Dig. 167.

(b) Id.

(c) Cowp. 588; 2 Chitt. Pl. 486 z; Bac. Abr. *Pleas*, &c. I. 1; 2 Saund. 297. (n 1.); *Warren v. Consett*, 2 Ld. Ray. 1503; 2 Chitt. Pl. 486.

(d) *Warren v. Theobald*, Cowp. 589; 2 Chitt. Pl. 486. n. c.

denial of that *fact*, is a proper general issue. (e) On a similar principle to that which governs in covenant broken, *nil debet* is not a good plea to debt on bond (f); and the plea is ill, on *gènèral* demurrer: it being *the nature* of the plea, and not the *manner* of pleading it, that is defective. (g)

But if *nil debet* is pleaded to debt on bond, and the plaintiff, instead of demurring, accepts the plea, and joins in the issue; the defendant is at liberty to prove any and every special matter of defence, which might be proved under the same plea, in debt on *simple contract* (h)—such as *want of consideration, payment, release, usury, infancy, &c.* For the plaintiff, by accepting the plea, founds his demand solely upon the *defendant's being indebted*; and thus waives the *estoppel*, or *conclusive* evidence of that fact, which the deed would have furnished against the defendant, under the plea of *non est factum*.

Yet when in *debt*, the plaintiff counts upon a deed only as *inducement* to the action, *nil debet* is a good plea—as, in the before mentioned case of debt for rent, due on a deed of lease. (i) For, in this case, *the subsequent occupation* of the defendant, under the demise, is the *gist* of the action; because rent is considered as a *profit, issuing out of land*; and when it is sued for, as a *debt*, the law considered the debt as arising

(e) 2 Saund. 297 (n. 1.); *Warren v. Theobald*, Cowp. 589; Bull. N. P. 170; 2 Chitt. Pl. 486. n. c.

And see *Allen v. Patterson*, 3 Seld. 476, that an averment, that the defendant 'is indebted for goods sold, and the debt is due,' is good. See also *Eno v. Woodworth*, 4 Comst. 249; *Hall v. Southmayd*, 15 Barb. 32; *Beekman v. Plattner*, 550; *Wiggin v. Gans*, 6 Sandf. 646; *Catlin v. Gunter*, 1 Duer, 253; *Lawrence v. Williams*, 585.

(f) *Meyer v. McClean*, 2 Johns. 183; *Bullins v. Giddens*, 8 Ib. 82; 2 Wils. 10; Cun. R. 75.

(g) 2 Wils. 10; Esp. Dig. 224.

(h) *Rawlins v. Danvers*, 5 Esp. 38; 1 Chitt. Pl. 478. *Vide Belser v. Irvine*, 4 McCord, 380.

(i) *Dean v. Grover*, 1 Saund. 276. (n. 1.); 2 Ib. 297, (n. 1.); *Atty v. Parish*, 1 New Rep. 109; 2 Chitt. Pl. 174. n. z.

out of the *receipt of the issues and profits* by the tenant, and not from the deed. (j)

The general issue, being a plea to *the action*, refers to the *count*, and not to *the writ*. Hence, if in account, the writ charges the defendant as receiver, *generally*, and the count, as receiver *by the hands of A.*, the plea 'never receiver,' denies only that the defendant was receiver *by the hands of A.*; and the plaintiff is not permitted to give evidence of the defendant's being his receiver in any other way. (k)

The conclusion of the general issue, as well as of all issues in fact, must conform to the particular *mode of trial* prescribed by law, for the determination of the matter in issue. And the mode of trial depends, in all cases upon the *nature of the fact* to be tried; as facts of different kinds require different modes of trial.

The different modes or species of trial, established by the common law, in civil cases, are: 1. By *record*; 2. By *inspection*, or *examination*; 3. By *certificate*; 4. By *witnesses*, (without the intervention of a jury); 5. By *wager of battle*; 6. By *wager of law*; 7. By *jury*. (l) It is unnecessary to treat here of any of these methods except the first and last mentioned.

The trial *by record* takes place whenever a record is directly put in issue, by the plea of *nul tiel record*. (m) This plea, (the only one by which a record can be *directly* put in issue), concludes with a *verification*; and the issue is then closed by the adverse party's *re-affirming* the existence of the record and praying that it may be inspected by the court. (n) For a record is of too high a nature to be tried by a jury, or in any

(j) See *Ten Eyck v. Houghtaling*, 12 How. Pr. 523.

(k) Co. Litt. 126. a. Bac. Abr. *Pleas*, &c. G. 1.

(l) 3 Black. Com. 330-348.

(m) 3 Black. Com. 330-1.

(n) Lawes' Pl. 146, 148, 226, 236; 2 Chitt. Pl. 488, 602; Com. R. 533; 2 Wils. 113, 114; *Hedges v. Sandow*, 2 T. R. 443; *Collins v. Mathew*, 5 East, 473. Vide *Tipping v. Johnson*, 2 Bos. & P. 302; Steph. Pl. 255.

other way, than by *itself*—i. e. by the court, on personal *inspection* of it.

But most issues in fact are tried by *jury*. And therefore when any matter, *not* of record, is denied by the general issue, the plea, in general, (in all cases, indeed, where no one of the other modes of trial, above enumerated, is necessary), concludes to *the country*, i. e. the jury.(o) And all issues in fact, whether general or special, if triable by *jury*, conclude in the same manner.(p)

The form of concluding a plea to the country, when the denial is on the part of the *defendant*, (as is always the case, when the general issue is pleaded), is as follows: ‘And of this the said C. D. *puts himself* on the country.’ But when the denial is on the part of the *plaintiff*, (i. e. when he puts in issue the defendant’s allegations), the established form of the conclusion is in these words: ‘And this the said A. B. prays, may be *inquired of* by the country.’(q) But where the denial or traverse, though it come on the part of the plaintiff, is in *negative* terms (as when he denies the defendant’s affirmative allegations), he may conclude in the *former* of these modes: it being deemed somewhat incongruous, to pray that a *negative* ‘may be inquired of.’(r) And as the mere mode of concluding to the country is, essentially, but *matter of form*; either of the above *formulae* might now perhaps, be used without hazard, by either party(s)

(o) 3 Black. Com. 315; Co. Litt. 126, a; Bac. Abr. *Pleas*, &c. G. 1.

(p) *Id.*

In New York by the Code [§ 968] issues of fact, in civil cases, may be tried by the court, by *consent* of parties;—either in writing, signed, and filed with the clerk; or in open court, by oral consent entered in the clerk’s minutes. [See *Brooklyn H. R. R. Co. v. Brooklyn C. R. R. Co.*, 105 App. Div. 88]. In pleading, however, we have *no conclusion*;—and very frequently we have *no issue*.

(q) 3 Black. Com. 313; Bac. Abr. *Pleas*, &c. G. 1.

(r) *Gravenor v. Stephens*, 10 Mod. 166; *Jefferies v. Dee*, 1 Lev. 281; Rast. Ent. 20 b. 36, 324.

(s) *Gravenor v. Stephens*, 10 Mod. 166; Steph. Pl. 2d ed. 279;

Whenever one of the parties concludes to the country, and thus refers the trial to the jury, the issue is *joined*, and made ready for trial, by the opposite party's adding, 'and the said A. B.' (or 'C. D.') 'does the like.'^(t) This addition, which, from its concluding word, is called the *similiter*, merely expresses the *concurrence* of the party, to whom the issue is tendered, with his adversary, in referring the trial to the jury. It is however, in strictness, no part of the *pleadings*; since it neither affirms nor denies any *fact*, in maintenance of the action, or the defence.

The *similiter* would therefore seem, on principale, to be only matter of *form*; and as such the omission of it would seem to be aided by verdict.^(u)

Vide *Hartwell v. Hemmenway*, 7 Pick. 117; *Bronce v. Watt*, 1 M. & G.. 30.

(t) 3 Black. Com. 315; Co. Litt. 126. a; Lawes' Pl. 147-8.

[There is really no issue joined till the *similiter* is filed, but the issue is raised without this. *Messer v. Smyth*, 60 N. H. 436. Under the codes an issue arises where a fact, or a conclusion of law, is maintained by one party and controverted by the other. N. Y. C. C. P., § 963].

[*Solomon v. Chesley*, 53 N. H. 163.]

(u) And so it was early determined, in the States of Connecticut and Massachusetts, *Huntington v. Babcock*, 2 Day, 392; *Whiting v. Cochran*, 9 Mass. 533; *Early v. Hall*, 22 Pick. 102. Indeed the Connecticut *postea* distinctly stated, that the parties *joined*, in referring the issue to the jury—the only fact, which the *similiter* is designed to show.

In the English courts, however, judgment has formerly been arrested after verdict, by reason of the omission of the *similiter*. *Heath v. Walker*, 2 Saund. 319. a. (n. 6.); Yelv. 65. n; *Copper v. Spencer*, 8 Mod. 376, Stra. 641. 1117; *Griffith v. Crockford*, 3 Brod. & Bing. 1; 6 Moore, 51. But the setting aside of verdicts, for this cause, has, in later times, been complained of as unreasonable, in the courts of Westminster; and the omission has consequently been allowed, upon the slightest possible grounds, to be *supplied* after verdict, by way of *amendment*. *Harvey v. Peake*, 3 Burr. 1793; *Sayer v. Preock*, Cowp. 407; *Grundy v. Mell*, 1 New Rep. 28. At this day indeed, the court, it seems, will, after verdict, as a *matter of course*, allow the record to be amended, by the insertion of the *similiter*, when omitted, if the allowance be not inconsistent with

The words 'in manner and form,' &c. which are regularly used in tendering an issue, either general or special, are sometimes of the *substance* of the issue, and sometimes merely words of *form*. When they are of the *substance* of the issue, they put in issue the *circumstances*, alleged as concomitants of the principal matter denied by the pleader, (such a *time, place, manner, &c.*): when *not* of the substance of the issue, they do *not* put in issue such circumstances.(v) And to determine when they are of the substance of the issue, and when not so, the established criterion is, that when the circumstances of *manner, time, place, &c.* alleged in connexion with the principal fact traversed, are *originally* and *in themselves material*, and therefore necessary to be *proved* as stated, the words "*modo et forma*," are of the substance of the issue, and *do* consequently put those concomitants in issue. But that when such concomitants or circumstances are *not* in themselves material, and therefore not necessary to be *proved* as stated, the words "*modo et forma*," are *not* of the substance of the issue, and consequently do not put them in issue.(w) The result then is, that these words may always be safely used, in tendering an issue; because, in their legal effect, they always put in issue all *material* circumstances, and no other.(x)

Hence if one party pleads a feoffment *by deed*, and the other traverses the feoffment, *modo et forma* as alleged; the deed, as well as the enfeoffing act, is put in issue.(y) And therefore proof of a feoffment *without* deed, is inadmissible, under this issue. For though a feoffment without deed is good, at com-

the justice of the case. Reeder v. Bloom, 2 Bing. 384. and vide *Wright v. Norton*, 2 Chitt. Rep. 25; 1 Stark. 400; *McLellan v. Crofton*, 6 Greenleaf, 327.

(v) Bac. Abr. *Pleas*, &c. G. 1; Lawes' Pl. 120; *Harris v. Ferrand*, Hardr. 39.

(w) Lawes' Pl. 120; *Farnell v. Tipper*, Latch, 92-3.

(x) 2 Saund. 319. (n. 6.); Lawes' Pl. 49. 120.

(y) Litt. § 483; Co. Litt. 281. b.

mon law; yet when it is pleaded *as by deed*, the deed becomes material, as an essential part of the conveyance.

But in trespass for an assault and battery, alleged to have been committed with *swords, daggers, &c.*, if the defendant pleads not guilty "in manner and form;" the plaintiff is at liberty to prove a battery, committed with *any other* weapon. And the same rule holds, on an indictment for *murder*, alleging a mortal wound to have been inflicted, with any particular weapon: the form or species of the *instrument* of the battery or homicide, being an immaterial circumstance. (z)

So also when *time, place, number, quantity, &c.*, alleged in the declaration, are not in themselves *material*, and therefore not necessary to be proved *as alleged*, the general issue, with the words "*modo et forma*," does not put them in *issue*. (a) And where a mis-statement, in any of these particulars, does not occasion a *variance*, they are in general *immaterial*.

And it seems that the words, "in manner and form," &c., though almost universally used, in tendering an issue in fact, are in no case, indispensable, even in point of *form*, to the legal sufficiency of the issue, or traverse, in which they are employed. (b)

IMMATERIAL AND INFORMAL ISSUES.—Under the present head, it may be proper to treat of *immaterial* and *informal* issues, whether general or special in their character.

An *immaterial issue* is one, *which passing by what is material* in the previous adverse pleading, is joined on an immaterial point; that is, a point not decisive of the right of the cause (c): as where issue is tendered upon matter of mere *form*, or upon matter of *inducement* or *aggravation*, or upon what is *impertinent*, or not alleged in the adverse pleading.

(z) 2 Hale, P. C. 185, 291; 9 Co. 67; 4. Black. Com. 196; 2 M'Nall. Ev. 520. 522; 1 Russ on Crimes, 467, (2d ed.)

(a) Lawes' Pl. 48-9, 120; Cro. Eliz. 12, 13; *Earl v. Pulteney*, Cowp. 260; *Goodwin v. Blackmar*, 3 Lev. 334; Com. Dig. *Pleader*, G. 1.

(b) Com. Dig. *Pleader*, G. 1; Lawes' Pl. 120.

(c) Bac. Abr. *Pleas*, &c. G. 2; 3 Black. Com. 395.

Thus, if in *assumpsit* against an executor, on a promise of his testator, the defendant pleads that *he himself*, did not promise; or if in *debt* on bond, the defendant pleads *not guilty*; or in *trover*, that he did not *find* the goods in question; the issue tendered is *immaterial*, and of course ill *in substance*; since the finding either way cannot enable the court to discover which party is entitled to judgment.(d) And such an issue, being radically defective, is not aided by *verdict*.(e)

Informal Issues.—When a *material* allegation is traversed in an *improper* or *inartificial* manner, the issue taken upon it, is called an *informal issue*.(f)

This defect is aided, after verdict, by the statute 32 H. 8, ch. 30.

But if the party, to whom such an issue is tendered *demurs* for the informality, instead of joining in the issue; the demurrer must be *special*, by the statute 27 Eliz. ch. 5; though the rule was otherwise, at common law.

NEGATIVE PREGNANT.—Under the class of informal issues, may be considered such as are joined upon a *negative pregnant*, or an *affirmative pregnant*. The former is a *negative* allegation, involving or admitting of an *affirmative implication* (g), or at least, an implication of some kind *favorable* to the adverse party.(h) An *affirmative pregnant* is an *affirm-*

(d) Id. *Marks v. Nottingham*, 2 Vent. 196; *Jones v. Bodinner*, Carth. 371; *Pick v. Hill*, 2 Mod. 137, 139; 2 Saund. 319. a. (n. 6.); Gilb. H. C. P. 147; *Griffith v. Williams*, 1 Wils. 338.

(e) Id. *Gerrish v. Train*, 3 Pick. 124. *Vide Arrest of Judgment*.

(f) Bac. Abr. Pleas, &c. G. 2, N. 5; 2 Saund. 319. a. (n. 6.); Gilb. H. C. P. 147.

(g) Litt. Rep. 65; Com. Dig. Pleader, R. 5; 2 Lill. Ab. 274; Bac. Abr. Pleas, &c. N. 6.

[For an example of a negative pregnant, see *Levin & Meyer Con. Co. v. Jackson*, 46 Misc. 545].

(h) An issue of this kind is here classed with *informal* issues, because the ground of objection to it is, not that it is *defective in substance*, as not involving what is *material or issuable*; but that it improperly includes, *with* what is material and issuable, what is *unnecessary* and *improper* to be put in issue.

ative allegation implying some *negative*, in favor of the adverse party. (i)

In 1841 Lord Chief Justice Tindal expressed the opinion that the doctrine of negative pregnant "has not been much regarded of late." *Bell v. Tuckett*, 3 M. & G. 802.

A negative pregnant is objectionable on the ground of ambiguity. It is a form of negative expression, which "rather supposes an affirmative than the contrary," and "every plea ought to contain a certain affirmation or negation of any single point in question." Thus, Lord Coke says, "*ne dona pas per le fait*" is bad because it implies a gift by parol, and is not a direct negative. Co. Litt. 126 a. The case in the Year Book, 26 Hen. VI. fols. 46, 47, and referred to in Bacon's Abridgment, Pleader I (6), and cited in the text, § 33, p. 297, is an instance. In waste, the plea was that the defendant cut down trees by the command of the predecessor of the plaintiff; a replication that he did not cut the trees by his command, was held bad. Yelverton, J., says: "It ought to have been that the predecessor did not command." Also cited in *Bell v. Tuckett*, 3 M. & G. 806, by Maule, J., and in *Jones v. Jones*, 16 M. & W. 709.

In trespass, for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so; and that he entered by that license. A replication to a plea justifying under the license of the plaintiff's daughter, traversing that he entered *per licentiam suam*, was held bad as a negative pregnant. This traverse might, as Serjeant Stephen observes, Stephen Pl. 2d ed. 424, (and the same remarks apply to the case in the Year Book), imply that a license was given, though the defendant did not enter by it; it is, therefore, pregnant with the admission that the license was given, and yet it is not expressly admitted, and it is in doubt whether the plaintiff means to deny the license, or the entry by virtue of it. *Myn v. Cole*, Cro. Jac. 87, cited in *Jones v. Jones*, 16 M. & W. 709.

In trespass, where the defendant pleads *liberum tenementum* in C. D., and justifies the trespasses as the servant of C. D., and by

(i) Id.

[*Application in Criminal Cases.*—The law relating to affirmatives and negatives pregnant, has been confined to the rules of pleading in civil actions, and has no place in criminal law; but a proposition in an instruction to a jury stated in the form of an affirmative pregnant is subject to all the objections against it as a rule of pleading and is likely to be much more misleading and harmful. *Fields v. State*, 134 Ind. 46, 53.]

As a general rule, therefore, an issue cannot properly be joined upon a *negative pregnant* (*j*): because the *affirmative*

his command, a replication that the defendant did not, as the servant of C. D., and by his command, commit the trespasses, is bad on special demurrer, as involving a negative pregnant. The replication implies an admission that there was a command, and yet does not expressly admit it, and leaves it uncertain what the question is. Further, it would be true if the defendant did not enter at all, and, therefore, would be a denial of the very fact which both parties previously admitted. It was, therefore, held to be ill pleaded. In this replication the plaintiff should have pursued the ordinary form; he should have replied, admitting the *lib. tem.*, *de injuriâ absque residuo causæ*, or generally that the defendant committed the trespasses *de injuriâ* and without the command of C. D. *Jones v. Jones*, 16 M. & W. 699.

(*j*) Co. Litt. 126, a, 303, a; *Munn v. Cole*, Cro. Jac. 87; *Ive v. Chester*, 560; Lawes' Pl. 113, 114.

[*Under the Codes.*—The rule as to a negative pregnant being founded on sound reasons, and not being merely technical, is in force under the codes. *J. I. Porter Lumber Co. v. Hill*, 72 Ark. 62; *Fields v. State*, 134 Ind. 46; *Stone v. Quaalé*, 36 Minn. 46; *Nunne-macker v. Johnson*, 38 Minn. 390; *Jackson v. Green*, 13 Okla. 314; *Ex parte Wall*, 107 U. S. 265.

An answer that denies in the very words of the complaint is generally open to this objection; as, for example, that payment was made on the day named in the complaint (*Argard v. Packer*, 81 Wis. 581); or that certain property was wholly destroyed by fire on a particular day (*Curnow v. Phoenix Ins. Co.*, 46 S. C. 79); or that the defendant ran into the plaintiff with his automobile on a day named at a place described (*Shepard v. Wood*, 116 App. Div. 861).

A denial that the defendant agreed in writing to pay interest is a negative pregnant when the complaint alleges an express agreement to pay interest. *Crane Bros. Mfg. Co. v. Morse*, 49 Wis. 368.

In *Baker v. Bailey*, 16 Barb. 54, the allegation was that on Dec. 18th, the defendant assaulted a person who, by reason of his injuries, died on Dec. 25th. The answer denied that defendant on Dec. 18th committed an assault from which death resulted on Dec. 25th. This was a clear case of negative pregnant. Said the court: "Time and place are immaterial; * * * and the plaintiff could have proved the commission of the injury on any other day than that stated in the complaint. The defendant has denied that he made the assault and that the deceased died of the injury committed, on the particular days stated in the complaint, leaving the answer pregnant

implication to which it is open, destroys the effect of the denial, or traverse. Thus, if the defendant pleads in bar a release, made *since the date of the writ*; and the plaintiff replies, that the said supposed writing "is not his act, *since the date of the writ*;" the replication is a *negative pregnant*. For it admits, by implication, a release made *before* the date of the writ, and which would be as effectual a bar to the action, as one made *afterwards*.

An issue joined upon a *negative pregnant*, differs from an *immaterial issue*, properly so called, in this:—That the terms of the former include, regularly,¹ as well what is *not* material,

with the affirmative admission that he made the assault, and that the deceased died thereof, on other days than those mentioned in the complaint."

General Denial—Each and Every Allegation.—In *Stone v. Quaal*, 36 Minn. 46, the court, by Chief Justice Gilfillan, said:

"There are several facts alleged—the taking, and the time and place. Each is denied, and each, when denied, if material to the cause of action, must be proved. The court below appears to have considered the denial as though it put in issue only the conjunction of these several facts. If that were so, of course the denial would be bad, unless such conjunction were essential to the cause of action. But this is not the purport of the denial of 'each and every allegation,' which refers to each of the facts alleged, and not to the manner or connection in which they may be stated. A general denial is, therefore, a *negative pregnant* only when a more specific denial would be."

In *Donovan v. Main*, 74 App. Div. 44, 46, it was pointed out, though, that denials *in hæc verba* are not always open to this objection. "When a paragraph of a complaint contains allegations material to the cause of action the answer may contain a general or specific denial of each material allegation of the complaint" (Code Civ. Proc., § 500); that is, it may deny each and every allegation of a paragraph or may use either the substantive words or the exact words of the allegation in making the denial. Either form in the present case constitutes good pleading.]

Under the Code, it has been held that a *general denial* of 'each and every allegation in the complaint,' reaches the *truth of the complaint in every material fact*. (18 Barb. 29.) In an action for the conversion of personal property, such a general denial covers the *title* to the property, as well as the *taking* of it. 14 Barb. 536.

(as *time, place, manner, &c.*), as what is so; and in all cases, leave it *uncertain* which of two or more things the pleader intends to *contest* whereas a traverse, tendering an issue, *strictly immaterial*, includes *only* what is *immaterial*. Thus, in the example last given, of a plea of release, after the date of the writ, the traverse, in the replication, extends as well to *the time*, alleged in the plea, and which is immaterial, as to *the release itself*. And as it does not appear, from the terms of the traverse, upon which of those points the plaintiff intends to rest his defence; the replication may be considered as ill, for this *uncertainty*. The proper mode of traversing the release would have been, by replying that it is "not his act, in *manner and form*," &c.; or, that it "is not his act," without the subsequent words.

The same explanation may be applied to the following case: In replevin, the defendant avowed the taking of the plaintiff's cattle for rent arrear, reserved on a lease; alleging that on the *first day of Nov.*, in the 18th year of the reign of the king, he demised to the plaintiff, &c. The plaintiff pleaded to the avowry, that the avowant, "*on the said first day of Nov.*, in the said 18th year, &c., did not demise," &c., in manner and form, &c. In this case, the traverse of the plaintiff was a *negative pregnant*: as it included the time of the demise, which was *immaterial*. But the avowry being itself defective; the case was decided on other grounds. (*k*) The traverse should have been, that the avowant "did not demise, in manner and form."

Again: Where in trespass for cutting the plaintiff's trees, the defendant pleaded, that he cut them "by command of the plaintiff;" a replication, that the defendant "did not cut them by command of the plaintiff," was held to be a *negative pregnant*—as the denial extended as well to the act of *cutting the trees* as to the command. (*l*)

(*k*) 2 Saund. 317; *Holbeck v. Bennett*, 2 Lev. 11.

(*l*) Bac. Abr. *Pleas*, &c., I, 6; Doct. Pl. 256. And *vide* Com. Dig.

The traverse should have been limited to the alleged *command*, in one of the forms last mentioned.

By the statute 32 H 8, c. 30, an issue, joined on a *negative pregnant*, is aided by a verdict for either of the parties. (m)

But by the common law, such an issue is not thus aided, unless the finding shows for *which* party judgment ought to be given. (n) But generally, at least, and probably in all cases, a verdict *for* the party, *who tenders* the issue by a negative pregnant, will *not* show for which party judgment ought to be given: whereas, a verdict for the party, *to whom* the issue is tendered, will regularly show, (if there is no substantial defect in the *previous* pleading, on *his own* part), that *he* is entitled to judgment. Thus, in the first example already given of an issue of this kind, where the defendant pleaded a release *since the date of the writ*, and the plaintiff denied in his replication, that he had released "since the date of the writ;" a verdict for the *defendant* would have shown that he was entitled to judgment; although a finding the other way would have decided nothing. And in each of the other foregoing examples, a verdict finding the *affirmative* of the issue would have shown that he *to whom* the issue was tendered was entitled to judgment, unless some substantial fault could be found in his *own previous* pleading.

If however the party, to whom issue is tendered on a negative pregnant, *demurs* for that cause instead of joining the issue tendered; the demurrer must, under the English statutes of jeofails (27 Eliz. c. 5, & 4 Ann. c. 16), be

Pleader, R. 5; *Dighton & Clark's Case*, 2 Leon. 197; Cro. Jac. 87; Steph. Pl. 381-384.

(m) Co. Litt. 126, a; 303, a; Cro. Jac. 87, 312; Gilb. H. C. P. 147; 2 Saund. 319. (n. 6.)

(n) 3 Black. Com. 395; *Marks v. Nottingham*, 2 Vent. 196; *Tryon v. Carter*, 2 Stra. 994; *Rex v. Ellames*, Cun. R. 71; *Middleton v. Croft*, Cun. R. 106; *Fletcher v. Hennington*, 2 Burr. 944; *Rex v. Phillips*, 1 Ib. 302; 7 Mod. 231; 2 Wils. 173.

special.(o) But by the *common* law, which in general treats substantial and formal defects with equal rigor, a negative pregnant is ill, on *general* demurrer.

But where the affirmative, implied in a negative allegation, is such as *would not maintain the pleading on the other side*, it does no harm and affords no ground of exception. In such a case, therefore, the negative allegation is not called a *negative pregnant*.(p) Hence, when in debt for labor done, the plaintiff alleged that the defendant retained him *in husbandry*, and the defendant pleaded that he did not retain the plaintiff *in husbandry*; the plea, though it implied an affirmative as tacitly admitting a retainer of a *different kind*, was held good: since proof of any other retainer, than *in husbandry* would not maintain the count; as it would be a variance. So also, if the defendant pleads title to the freehold, under a devise from J. S.; alleging that J. S. died seised in *fee-simple*, and the plaintiff replies that J. S. did not die seised *in fee-simple*; the replication, thought open to the implication that he died seised *in tail*, or of the largest estate *less* than a fee-simple, would doubtless, not be faulty by reason of this implication: because proof of any other estate in the testator, than a fee-simple, would not support the defendant's plea of title under the devise.

The same principles are applicable to *affirmatives pregnant*. The following may be taken as an example of such an allegation: if to an action of *assumpsit*, which is barred by the

(o) Bac. Abr. *Abatement, &c.*, B.; *Pleas, &c.*, I, 6.

Statutes of *jeofails*, substantially like those last mentioned, exist in probably all of the United States.

The New York Code is more than liberal, as to amendments. See Code, §§ [721 *et seq.*] The court may, at any stage of the proceedings, disregard any error, or defect, in the pleadings or proceedings, which shall not affect the *substantial rights* of the adverse party. And *no judgment* shall be *reversed*, or *affected*, by reason of any such error, or defect. *Cayuga Bank v. Varden*, 2 Seld. 19. See *ante* AMENDMENTS.

(p) Com. Dig. *Pleader*, R. 6; *Lowes'* Pl. 114.

The general issue, as has been already mentioned, covers the whole declaration, and thus enables the defendant to contest all the plaintiff's material allegations. (r)

(r) Bac. Abr. *Pleas*, &c., G. 1; 3 Black Com. 305.

Evidence which merely disproves the plaintiff's allegations is not new matter, and so may be introduced under a general denial. *Am. Bldg. & Loan Assn. v. Rainbolt*, 48 Neb. 434.

Non-performance of a condition precedent cannot be shown under the general issue. *Vail v. Pa. Fire Ins. Co.*, 67 N. J. L. 422].

In some cases, however, even according to the ancient and most rigorous principles of pleading, the general issue may properly be pleaded, when none of the *facts* alleged in the declaration are intended to be *actually* denied under it. Such is the case where the action is founded on a bond, or other specialty, which is void at common law, through an *absolute incapacity* in the obligor. Thus if an action is brought on a bond, or other deed, executed by a *feme covert*; she may plead *non est factum*; and proof of her coverture will support the plea.(s) But the defence of coverture, in this case, is considered *in the law*, as going *in denial* of the declaration. For her incapacity to bind herself, by any contract, being *absolute and total*; she is regarded, as being *not a moral agent* in executing the instrument; and it is therefore not considered as *her act*. And according to what appear to be the more reasonable opinions, the same rule applies, and for the same reason, to the deed of an *idiot* or a *lunatic*; but on this point, the authorities are not all agreed.(t)

But if the legal incapacity of the party executing the specialty, on which the action is founded is only *partial or qualified*—as if the suit is on the bond of an *infant*; he cannot give his infancy in evidence, under the plea of *non est factum*; but must plead it *specially*.(u) For the legal incapacity of an infant not being *absolute*; a bond executed by him is considered as *his act*, though avoidable by him; and therefore, proof of his infancy does not support the plea that the instrument is *not his act*. The defence is inconsistent with the plea.

The rule is the same, in the case of a bond obtained by

(s) 5 Co. 119; 2 Wils. 341, 347; 1 Pow. on Cont. 96; Gilb. Ev. 162; Com. Dig. *Pleader*, 2 W. 18.

(t) *Thompson v. Leach*, 2 Vent. 198; 2 Stra. 1104; 1 Ld. Ray. 315; 2 Salk. 675; 4 Co. 123; *Evans v. Harrison*, Willmot, 155; Chitt. on Cont. 260; *Webster v. Woodford*, 3 Day, 90; *Rice v. Pitt*, 15 Johns. 503; *Mitchell v. Kingman*, 5 Pick. 431.

(u) 3 Burr. 1805; 1 Salk. 279; Gilb. Ev. 162-3; Com. Dig. *Pleader*, 2 W. 22.

duress. For it is *the act* of the party making it, though *avoidable*, as in the preceding case.(v) The duress must therefore, be pleaded *pecially*; as the defence would contradict the general issue. For the latter plea *denies* the execution of the bond; but the defence of duress *admits* it.

So also, where a specialty is declared void by *statute*, for any cause—as, for *usury*, *gaming*, or other illegal consideration—the obligor, or maker of the deed, cannot avail himself of the statute, under *the general issue*; but must *plead it specially*, i. e. he must plead specially the facts, which bring the case within the statute.(w) For the instrument, though it creates no legal obligation, is nevertheless, as in the preceding cases, *his act*; and the special matter of the defence is therefore *inconsistent* with the plea of *non est factum*.

But *fraud*, in the execution of deed, may be proved under the plea of *non est factum*: as, where one is, by a *deception* practised upon him, induced to execute an instrument, materially *different* from what he believed it to be—*ex. gr.* a *bond*, instead of a *release*—or an obligation for £100, instead of one for £10.(x) For in such a case, proof of the fraud goes directly to support the plea: inasmuch as the instrument thus obtained, is not in law *the deed* of the party sealing it.

Thus also, the *want of complete delivery*—as in the case of an *escrow*, where the condition, on which it was to be delivered over, is not complied with—*loss of the seal*—*erasure*—*interpolation*, or *any alteration*, in general, after the delivery—are, respectively good evidence under the plea of *non est factum* to an action on a deed.(y) The two first of these

(v) 2 Black. Com. 296; 5 Co. 119, a; Com. Dig. *Pleader*, 2 W. 19, 20; Bull. N. P. 172.

(w) 5 Co. 119, a; Hob. 72; 1 Stra. 498; 2 Black. Rep. 1108; Com. Dig. *Pleader*, 2 W. 23; Gilb. Ev. 163.

(x) 2 Black. Com. 308; 2 Co. 3, 9, b; Shep. Touch. 70-1; 4 Cruise's Dig. 27; 2 T. R. 765; 3 Ib. 438.

(y) 5 Co. 23, a; 11 Ib. 27, a, b; 28, b; Doct. Pl. 259, 262; 2 Show. 28-9; Gilb. Ev. 109.

grounds of defence are founded on the principle, that without a complete delivery or without a seal, no deed can exist in law; and consequently if an instrument, originally sealed, loses its seal, though after delivery, it ceases, *ipso facto*, to be *a deed*.(z) As to the other grounds of defence last mentioned, it may be observed, that where a deed, originally valid, is *altered after its delivery*, it is no longer the *same instrument*, which the maker executed.

According to the strict, original principles of the common law, no defences would appear to be admissible, in any case, under the general issue, except such as go in denial of *the truth of the declaration*. And therefore all special matters of defence, which admit, but go in *avoidance* of, the declaration, would seem to require *special* pleas in bar, as being *inconsistent* with the general issue.(a)

(z) Where the seal is lost or destroyed, otherwise than by the act of the party, claiming under it, he may be relieved against the accident, *in equity*.

(a) [A general denial is overcome by a subsequent confession and avoidance. It follows that no issue arises on a general denial which is followed by a special plea confessing and avoiding. *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34.

In *Grant v. Pratt & Lambert*, 87 App. Div. 490, 494, the First Department thus stated the law:

"It is quite probable that at common law proof of waiver might be given under the general issue. Some of the cases have gone so far as to hold that nearly every defense which showed that at the time when the action was brought there was in fact no subsisting cause of action might be proven under the general issue (*Wilt v. Ogden*, 13 Johns. 56; *Young v. Rummell*, 2 Hill, 478). However broad the common-law rule might have been under the general issue, it is evident that under the provisions of the Code the defense of waiver must be pleaded in order to be available as a defense. In principle waiver constitutes new matter, * * * It is matter in avoidance of consequences which flow from the breach, and, as such, must be pleaded. Under a general denial a defendant is authorized to controvert by evidence every fact which the plaintiff is bound to show to maintain his cause of action, and under such issue may show that the plaintiff never had a cause of action

In the original *common-law* actions of *debt* on specialty—*covenant broken*—*account*—*detinue*—*trespass*—and *replevin*, the above principle has generally been observed; and therefore in these actions, matters of *avoidance* have in general been, as they still are, inadmissible defences, under the general issue, except in so far as the principle, excluding them under that issue, has been relaxed by statute provisions, or rules of court. Hence in these actions, any defence, which does not imply a *denial* of the material facts, or of what are alleged as such, in the declaration, must be *specially pleaded*.

But in actions of *trespass on the case*, which, as having originated in the *equity* of the statute of Westm. 2, (13 Edw. 1) are regarded as *equitable* actions, a more liberal, or rather a more lax mode of pleading, has, with some exceptions, been allowed. (b) Hence, in this comprehensive class of actions, whether arising *ex contractu* or *ex delicto*, many defences, which go merely *in avoidance* of the declaration, have been admitted under the *general issue*.

In an action of *assumpsit* especially, this is eminently the case. For in this action, not only such defences as deny the allegations in the declaration—but almost all matters of avoidance—such as *coverture*—*infancy*—*usury*, or other illegality—*duress*—*payment*—*release*—a *specialty* given for the debt—a *judgment* rendered for either party, in a former action for the same cause—an *award of arbitrators*, deciding the right in

(*Benton v. Hatch*, 43 Hun, 142; 122 N. Y. 322).” And see, *Whitney v. Whitney*, 171 N. Y. 176, 181.

Payment, in whole or in part, release, accord and satisfaction, arbitrament, &c., must be pleaded under the codes (*McKyring v. Bull*, 16 N. Y. 297); as it is a purpose of the Code provision respecting the answer to give notice to the plaintiff of the defense claimed to exist to the cause of action, and to limit the issues which may be properly litigated upon the trial. See *McKay v. Draper*, 27 N. Y. 266; *Fischer v. Met. Life Ins. Co.*, 37 App. Div. 575; 167 N. Y. 178; *Kniffen v. McConnell*, 30 N. Y. 285; *Horton v. Horton*, 83 Hun, 213; *Gabay v. Doane*, 77 App. Div. 413].

(b) 3 Burr. 1253; Bac. Abr. *Pleas*, &c., G. 2; Yelv. 174, b. (n. 1.)

question—and *accord and satisfaction* (c), are respectively good defences, under the plea of non assumpsit. (d)

This practice appears to be a very wide departure from the general principle above mentioned, except where the action is founded upon an *implied* promise; in which case, it may, in theory at least, be reconciled with that principle, by adverting to the peculiar nature of the action of *indebitatus assumpsit*. For in that action, as the promise, laid in the declaration, is a mere *inference or conclusion of law*, from the *debt or legal liability*, alleged as its consideration, (which inference the law *continually* raises, while the legal liability remains, and no longer); it results, that whatever disproves a *subsisting* debt,

(c) It has been questioned by some, whether *accord and satisfaction* can be given in evidence, under *non assumpsit*. But the same *reason*, which justifies the admission of the other enumerated defenses, under the same plea, most clearly extends to this: since it goes in *extinguishment of the debt*. And the weight of authority is on the same side of the question. (12 Mod. 377; 1 Ld. Ray. 566; Com. Dig. *Accord*; Bac. Abr. *Accord*; 5 East, 230; 4 Esp. Rep. 181.)

(d) Bac. Abr. *Pleas*, &c., G. T; 2 Burr. 1010, 3 Ib. 1353; 1 Stra. 498; Ld. Ray. 566, 787; Doug. 108; 2 H. Black. 143; 5 East, 230; 4 Esp. Rep. 181; Com. Dig. *Accord*; 12 Mod. 377; Chitt. on Bills, 197-8; 1 Chitt. Pl. 472-3.

The difference between a *general issue*, and a *general denial*, is very radical. *Usury* is an *affirmative* defense; it is not included in a general denial, and must be specially and distinctly averred in the answer. 10 Barb. 321; 31 Barb. 100. So, of all defenses, that are based on an *affirmative fact, not appearing except by the answer*; see 12 Barb. 601; 15 How. Pr. 29; 2 Kern. 15; *McKyring v. Bull*, 16 N. Y. Rep. 297. The *reason* of this difference is that a general denial is *construed literally*; and merely *denies those particular facts which are alleged in the complaint*: whereas the *general issue* is *construed literally*; and is held to cover everything which disproves a *subsisting legal liability*, at the time of plea pleaded (as expressed in the next section of the text).

[*Ultra vires* is an affirmative defense not available unless pleaded. *Keating v. American Brewing Co.*, 62 App. Div. 501. So is breach of warranty (*Carmichael v. John Hancock Ins. Co.*, 48 Misc. 386); and accord and satisfaction (*Mitterwallner v. Supreme Lodge*, 109 App. Div. 70); and a judgment in another action between the same parties (*Lytle v. Crawford*, 69 App. Div. 273)].

or legal *liability* at the time of plea pleaded, disproves the alleged *promise*. And the existence of the *debt*, &c. at the time of pleading, may be disproved, by showing, either that it *never existed*, or that it has been, by any means, *extinguished* before that time. As therefore, each of the several defences, enumerated in the last section, goes to the proof of the one or the other of these two points; it follows, that they all, in their legal effect go in *denial* of the alleged promise, and consequently in support of the plea of *non assumpsit*.

From the preceding remarks it will also be apparent, that in the action of *indebitatus assumpsit*, the plea of *non assumpsit*, though expressed in the past tense, does not mean that the defendant did not *actually promise*, as stated in the declaration, (for the action is not founded on a promise *in fact*); but that he is, at *the time of pleading*, *not indebted* to the plaintiff, or not in law *liable to the demand*, made in the declaration.

It is quite apparent, however, that the reasons, just assigned for allowing such a latitude to the general issue, in *indebitatus assumpsit*, and which are founded on the *peculiarities* of that action, are inapplicable to the action of assumpsit on *express* promises; and consequently, that the special matters of defence, before mentioned, or at least such of them as accrue *subsequently* to the making of the promise, are *on principle*, *inadmissible*, under *non assumpsit*, in the latter action. And so the rule appears to have been formerly, in practice. (e) But through inadvertence, in not attending to the distinction between the two forms of assumpsit, or from some other cause, the rule has been now long established, that *all* the defences, which are admissible under the general issue, in the one form of action, are so in the *other*.

But even in *assumpsit*, the *statute of limitations*—*tender*—*set-off*—and *bankruptcy*, are, on common law principles inadmissible defences, under the general issue, and must therefore

(e) 1 Mod. 210.

be pleaded specially. (f) For these defences, respectively, admit the *debt*, or *gist* of the action, and go in denial of the *remedy only*.

In *indebitatus assumpsit*, (and now in all actions of *assumpsit*), the plea of *non assumpsit*, as before explained, appears to have the same comprehensive legal effect, as that of *nil debet* in debt on simple contract; and therefore the same defences appear, on principle, to be admissible, under both these issues; as in most instances they are. (g)

It is held, however, that the *statute of limitations*, though inadmissible under *non assumpsit*, is a good defence, in debt on simple contract, under the plea of *nil debet* (h); because the plea is in the *present tense*. But so, *in effect*, is the plea of *non assumpsit*. And if the reason of the rule, which excludes this defence under the latter plea, is a sound one; the same rule, it would seem, ought to be applied to the former. (i)

Advantage may also be taken of the statute of *frauds and perjuries*, under the plea of *non assumpsit*, by excepting to all parol evidence offered in support of the declaration. (j)

In those actions on *the case* also, which arise *ex delicto*, matters of *mere avoidance* have, to a very considerable extent, been admitted in evidence, under the general issue. It would be difficult, however, to discover any precise *principle*, by which this practice may be justified, or any definite general rule, by which to limit its precise extent. Indeed the practice appears to be, in a great measure, an arbitrary departure from the original principles of the law, and as such, to rest on *authority*, rather than any known legal reason.

(f) 1 Ld. Ray. 153; Tidd, 375; 1 Saund. 283 (n. 2); Chitt. on Bills, 198.

(g) Cro. Eliz. 140, 222; 5 Mod. 18; 1 Salk. 284; 2 Phil. Ev. 94; 1 Saund. 283. (n. 2.)

(h) 1 Saund. 283. (n. 2.); 1 Ld. Ray. 153, 566; 1 Salk. 278; Com. Dig. Pleader, 2 W. 16.

(i) Vide 1 Chitt. Pl. 476; 1 Saund. 283 (n. 2.); 2 Mass. 87.

(j) 1 Bro. C. C. 93; 1 Chitt. Pl. 470.

According to this practice, however (whatever may have been its origin), the rule has now become general, that in actions *on the case*, *ex delicto*, the defendant may prove, under the plea of *not guilty*, almost every special matter of defence, which conduces to show, that *at the time of pleading, he is not liable* to the plaintiff's demand. (*k*) For example, a *license*, or any other *justification* (*l*)—a *former recovery—release—accord and satisfaction*, &c. (*m*)

These special defences, however, and all other which *confess* the truth of the declaration, *may be specially pleaded*, instead of being given in evidence, under the general issue: A rule which holds in *assumpsit* also. For regularly, no plea which *admits* the truth of the declaration can be said to amount to the *general issue*: though the matter of it might have been given in evidence, under that issue. (*n*)

In the single case of *trover*, however, it has been held that there is but *one* good special plea to the action, viz. *release*: all other such pleas amounting, it is said, to the *general*

(*k*) 3 Burr. 1353; 1 Blask. R. 388; 1 Wils. 45; 1 Chitt. Pl. 486-7.

(*l*) 8 East, 308; 2 Mod. 6, 7.

[A general denial alone is the correct and scientific answer to a complaint for false imprisonment or for malicious prosecution, and raises the whole issue on the complaint. So facts showing justification need not be pleaded. *East v. Brooklyn Heights Railroad Company*, 115 App. Div. 683].

(*m*) 2 Mod. 276; 3 Ib. 166; Com. R. 273; 1 Wils. 44, 175; 2 Phil. Ev. 108; Bac. Abr. *Pleas*, &c. I 1; 1 Keb. 305.

(*n*) 1 Ld. Ray. 88-9; 1 Salk. 394; 5 Mod. 18; Carth. 356; Lawes' Pl. 112; Tidd, 591, 599.

Under the Code, the safer and plainer mode of answering is, to make *specific averments* of the *facts*, which constitute the defense, in all cases where a *denial* of the complaint,—(general or special,)—cannot safely be made. That is, where *facts*, *not* included in the statements of the complaint, are to be *set up* for the defense. In these cases, however, the answer should set up *only*, such facts as are *necessary* to the ground of defense. 1 Duer, 253; 9 Barb. 371; 3 Seld. 476; 16 N. Y. 297, may be referred to, to show what facts are necessary, in certain cases; and how particularly to be averred.

issue. (o) And if we are here to understand the word "release," not as meaning exclusively a *formal, technical* release or acquittance, but as including *whatever extinguishes or discharges* a right of action once existing—as *accord and satisfaction*, a *former recovery*, or a *former bar*, an award of *arbitrators*, &c. (and in this sense the term appears to have been used); the position will appear to be not destitute of a foundation in principle. For as the *conversion*, which is the gist of the action in trover, is, *ex vi termini*, a *tortious* act, which cannot in law be *justified* or *excused*; it is manifest that any plea alleging matter of *justification* or *excuse*, (as a *license* from the plaintiff—an *authority* derived from the law, &c.) is equivalent to the plea of *not guilty*; since it must involve a denial of the conversion.

In *slander*, the defendant is allowed to prove under the general issue, that the words were spoken by him *as counsel* in a cause; or in honest confidence, and for a justifiable reason—(as in fairly giving the character of a servant); or to show any other fact, in general, which conduces to prove that the words were not uttered *maliciously* (p): *malice* being in this action, of the gist of the action. (q) All these and similar defences may, however, be pleaded specially. (r)

(o) Bac. Abr. *Pleas*, &c., I, 1; 1 Keb. 305; Yelv. 174, a (n. 1.); Reg. Pl. 268.

(p) 2 Selw. N. P. 929, 1066; 1 Saund. 131 (n. 1.); Cro. Jac. 90; 1 B. & A. 232; 1 M. & S. 644; 15 Mass. 50, 57; 4 Ib. 1; 2 Pick. 310; Bull. N. P. 8; 1 T. R. 110; 1 Bos. & P. 525; 1 Campb. 267; 3 Johns. 180.

(q) Yet the defendant in slander, is not allowed to prove the *truth* of the words, under the general issue, (2 Stra. 1200; Bull. N. P. 9; Willes, 20; 1 Saund. 130 (n. 1.); 1 T. R. 748; 1 Bos. & P. 525; 2 Ib. 225 (n. a.); *Bank v. Bowdye Bros.*, 92 Tenn. 723; Com. Dig. *Pleader*, 2 L. 2); though the truth of the words plainly conduces to rebut the legal presumption of *malice*.

(r) 1 Saund. 130-1. (n. 1.)

By the New York Code, (sec. 535) in *libel* and *slander*, the defendant may *both justify, and set up mitigating circumstances*, and whether, or not, he prove the justification, he may prove the

But it seems impossible to reconcile all the different rules admitting and excluding special matters of defence, under the general issue, *in actions on the case*, either with the strict principles of the common law or with each other.

The universal principle which, by the common law, renders any given evidence admissible under any given issue, is its relevancy to the issue—i. e. its conduciveness, or tendency to *prove* the affirmative or negative of the issue. And according to this principle, no evidence is admissible, on the part of the defendant, under the *general issue*, except such as conduces to disprove *the declaration*. But in *actions on the case*, as has been shown, many deviations from this simple principle have been sanctioned by courts of justice; and various similar deviations from the same principle have been introduced, and extended to *other actions*, both in England (s) and in the United States, by legislative enactments, and rules of court, for the purpose of enlarging the office of the general issue, and of allowing the defendant to give in evidence, under it, many special matters of defence, which, as being *inconsistent with it*, are by the strict original rules of the common law, required to be pleaded specially.

mitigating circumstances. He may, also, *deny and justify* in the same answer. 6 How. Pr. 15; 9 Ib. 289; 10 Ib. 79; 17 Barb. 649; 3 Duer, 684; 1 Kern. 347; 2 Ib. 67.

[Matter in mitigation must be pleaded as a partial defense in order to be available as evidence. *Gray v. Brooklyn Union Pub. Co.*, Second Dept., 35 A. D. 286; *Willlover v. Hill*, 72 N. Y. 36; *Potter v. Frail*, 67 How. Pr. 444. And the fact that the answer commences as an answer in bar in the ordinary form does not vitiate the same as an answer setting up mitigating facts and circumstances under the Code provision. *Bennett v. Matthews*, 64 Barb. 410-414.

Under Section 536 it has been held that a defendant is precluded from proving mitigating circumstances which he has not stated in the pleading. *Bradner v. Faulkner*, 93 N. Y. 315].

(s) Com. Dig. *Pleader*, E. 13.

[Under a general denial, matters tending to show justification are not provable (*Brothers v. Forbes*, 17 Wkly. Dig. 474); and the truth of the words spoken, in slander, must be pleaded in justification or mitigation (*Roeber v. New Yorker Staats Zeitung*, 1 App. Div. 427).

Instead of pleading the *general issue*, the defendant may, in some cases, effectually answer the declaration by a *special issue*—i. e. by directly denying some one material and traversable allegation in the declaration, and concluding to the country. (t)

A *special issue*, however, is not adapted to all cases. Its proper use is limited to those cases, in which the declaration alleges at least *two* distinct substantive facts, both of which are essential to a right of action. In such a case, a denial of *one* of those facts—though it does not put the whole declaration in issue—is nevertheless as complete an answer in law to the whole right of action, as the general issue itself would be. For where two or more facts are necessary to constitute a right of recovery, it is self-evident, that a denial of any *one* of them is a denial of the entire right of recovery.

Thus, in *assumpsit* on a special agreement, where the right of action depends upon a *condition precedent*, and where the declaration specially alleges, as it must, performance of the condition—the defendant may, instead of pleading the general issue, deny the alleged *performance* of the condition *only*, and put himself upon the country. (u) If, for example, the plaintiff's right of action depends upon previous *notice* of some fact, to the defendant, or upon a special *request*; the defendant may take a special issue upon the allegation of such *notice*, in the one case, or such *request*, in the other. This mode of pleading *in assumpsit* is now, however, in a great measure obsolete: since every allegation, which might be denied by a special issue, may, in that action, be contested under the *general issue*.

But in some cases, special issues are still not only proper, but necessary—as where, in *covenant broken*, or other action on

(t) *Yelv.* 195; *Lawes' Pl.* 112, 135; *Gillb. H. C. P.* 61; *Com. Dig. Pleader*, R. 2; *Bac. Abr. Pleas, &c.*, G. 3, H. 1; [*Kimball v. Railroad Co.*, 55 *Vt.* 95, 97].

(u) *Doct. Pl.* 203; *Gillb. H. C. P.* 60–1, 139, 148; 1 *Chitt. Pl.* 467.

a *specialty*, performance of a *condition precedent* is alleged in the declaration. For in such a case, the defendant cannot contest the alleged performance of the condition, under the plea of *non est factum*. So also, in an action of covenant broken against a lessee, for not repairing a building, and in which the declaration alleges that the building was left *ruinous and out of repair*, the defendant may take issue upon this allegation, by averring that the building was *not* ruinous or out of repair, and conclude to the country. (v) For this defence would not maintain the plea of *non est factum*.

In actions founded on deeds, the defendant *may*, instead of pleading *non est factum* in common form, allege any special matter, which *admits the execution* of the writing in question, but which shows, nevertheless, that it is not *in law his deed*; and may conclude with *non est factum*: as that the writing was delivered to J. S. as *an escrow*, to be delivered over, on a certain condition, which has not been complied with, “and so is not his act:” or, that the writing *has been altered* by the plaintiff, since its delivery, “and so is not his act:” or, that the defendant was, at the time of making the writing, a *feme covert*; “and so it is not her act.” (w)

This anomalous plea is called, indifferently, “a *special non est factum*,” or “the general issue, *with an issint*”—the latter denomination being derived from the Norman word, “is-sint” (*so*), in the language of the plea. (x)

In a plea of this kind, the latter part, (the *non est factum*), is merely an *inference* from the special matter which precedes

(v) 2 Chitt. Pl. 501.

This last plea supposes *no* repairs to *have been necessary*. For if the defendant has *actually made* the repairs required by his covenant, his answer to the declaration should be a *special* plea, averring that he *did repair*, &c., and concluding with a *verification*. (2 Chitt. Pl. 501, n. y.) For in this case, the defense would be *performance*, which is matter of avoidance.

(w) Bac. Abr. *Pleas*, &c., H. 3, I. 2; Gilb. Ev. 164–6; Sev. 71, 72; Bridgm. 100; 1 Vent. 9, 210; 1 Salk. 274; 4 B. & A. 441.

(x) Id.

it: the word "so" being used in an illative sense, and conveying the same meaning as the word, "therefore." The special matter then merely shows *how* and *why* the instrument is not the defendant's act; and on the trial of the issue, the evidence on both sides is confined to the *special matter* alleged. For under a plea of this kind, the special facts so alleged, and no others, are put in issue.

It is manifest, therefore, that if the facts, specially stated in this plea, are not such as to show that the instrument is, in law, *not* the defendant's *deed*, or, (which is the same thing), not such as would, in evidence, maintain the general issue, when pleaded in its general and usual form; the plea is ill, and demurrable.(y) For as the facts, specially alleged, present *all* the grounds of the defence specifically, *upon the record*; the question of their sufficiency in law arises upon the face of the pleadings, as upon a plea merely special. If therefore the defendant pleads, that he was compelled by *duress* to execute the writing—or that, at the time of executing it, he was an *infant*—and concludes with the general issue; the plea is ill, and demurrable. For, as has been seen, these defences, like all others which render the instrument merely *voidable*, do not maintain that issue.(z)

The effect of a demurrer to a *special non est factum* is strictly analogous to that of a demurrer to *evidence*. The question of law, raised by the latter, is, whether the facts shown *in evidence* are sufficient in law to maintain the issue in fact, in favor of the party exhibiting the evidence.(a) And the question of law, raised by a demurrer to a *special non est factum*, is, whether the facts, specially alleged *in the plea*, are sufficient in law to maintain the general issue, (with which it concludes), in favor of the party pleading them.

The conclusion of this plea with the general issue, seems

(y) Gilb. Ev. 164-5. Vide 4 Esp. Rep. 255; 6 Mod. 217.

(z) 5 Co. 119; Plowd. 66; Gilb. Ev. 162; Com. Dig. *Pleader*, E. 30.

(a) Doug. 218, 225; Bull. N. P. 313. See DEMURRER TO EVIDENCE.

plainly to indicate that it ought to be referred to the *jury*; and the better authority appears to be, that it must be closed to the country.(b) But this conclusion, it may be observed, does not prevent the plaintiff from *demurring* for the legal insufficiency of the special matter, which precedes the *non est factum*. For though a conclusion to the country on either side, puts an end to the *pleadings*; it does not preclude a *demurrer* by the party, to whom the issue is tendered.

According to some opinions, however, a special *non est factum* may, and should, conclude with a *verification*.(c) But such a conclusion would alter the essential character of the plea, and convert it into a mere *special plea amounting to the general issue*, which is, regularly, inadmissible. Besides, it is difficult to discover any use or propriety in leaving the plea open to an answer. It cannot be necessary, to the end of giving the plaintiff an opportunity to *take issue* on the special facts stated in the plea (for these are put in issue by the plea itself); nor to enable him to make a special replication; for whatever could be specially replied, may be given in evidence *in disproof* of the plea.

(b) Plowd. 66; 3 Keb. 26; Bro. Ab. *General Issue*, pl. 26; 1 Vent. 9, 210; Bac. Abr. *Pleas*, &c., 1, 2; Com. Dig. *Pleader*, E. 32; 1 Salk. 274.

(c) Gilb. Ev. 164-5; Noy, 112.

CHAPTER II.

OF SPECIAL PLEAS IN BAR.

A *special* plea in bar, as usually defined, is one which *admits* the truth of the declaration, but alleges special matter in avoidance of it. (a) Of this class are such pleas, as *that of release, accord and satisfaction, payment, tender, a justifica-*

(a) Bac. Abr. *Pleas*, &c. (Intro. 2); Lawes' Pl. 37-8, 115, 129.

[In some States special pleas are abolished, and as a substitute the defendant annexes to the general issue a notice stating the nature of his defense. *McFarlane v. Ray*, 14 Mich. 465. So in Maine, a "brief statement" is used, and this is obnoxious to a demurrer if it contains matters admissible under the general issue. *Corthell v. Holmes*, 87 Me. 24.

In Illinois, by statute, "the defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, or may plead the general issue, and give notice, in writing, under the same, of the special matters intended to be relied on for a defense on the trial; under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon." This does not give a defendant the right to plead specially, and also give notice of the special matter relied on as a defence under the general issue. *Benjamin v. McConnell*, 4 Glim. 536. The general issue with notice of special matter and special pleas cannot be pleaded at the same time. *Gilmore v. Nowland*, 26 Ill. 200. By filing a special plea the defendant abandons a notice filed with the general issue. *Wyatt v. Dufréne*, 106 Ill. App. 214.

The notice which, in some States, is the substitute for a special plea need not be drawn with the same precision and certainty. But though the form of the special plea need not be observed, the substance of it must be. It must advise the plaintiff of what he will have to meet. *Farmers' Mut. Ins. Co. v. Crampton*, 43 Mich. 421; *Nott v. Stoddard*, 38 Vt. 25].

tion of any kind, the statute of *limitations*, or of *usury*, &c.—all which, like many others, confess, but *avoid*, the allegations in the declaration. (b)

But it is not universally true, (though generally so), that a special plea in bar goes, merely and exclusively, in confession and avoidance of the plaintiff's allegations. For in some instances, such a plea concludes with a *traverse* of part of the

(b) Under the Code, the general denial takes, (in most respects,) the place of the 'general issue';—a special denial takes the place of a 'special issue';—and all other answers aver new matter, and are substantially, 'special pleas in bar.' And, being such, they *should* be framed with the *care* and *precision*, required in common-law pleading; as well for the benefit of the party, as for that of the court. They should reach *the very point*,—*cover* it,—and *cover no more*. And to attain this end, it is necessary only that the pleader should know *what* is an answer, (in any given case,) and *why* it is one. See 14 Barb. 533; 5 Saund. 54; 12 How. Pr. 455. Stating facts, which are *inconsistent* with the complaint, (without a formal denial) makes *no answer*. 21 Barb. 190. But it has been held, that stating that the *credit*, on which goods were bought, *had not expired*, was a *special denial*. 12 How. Pr. 455.—*Quære*: on *what principle*? On the rule of *liberal construction*,—(the common-law rule, as to the 'general issue,' ante, section 48,)—it might be held to mean that at the time of answering, there was no right of action:—But how is it *any denial*? It is *only inferentially*, that it shows that, at the time of answering, there is no right of action. And *argumentative* pleading is bad. 1 Duer, 253; 3 Seld. 476.—As to the principle of the case in 12 How. see *infra* this chapter.

[The denial and the defense are distinct parts of the answer: a denial is not proper in the defense. *Burkett v. Bennett*, 35 Misc. 318; *Cruikshank v. Press Pub. Co.*, 32 Misc. 152.]

A denial of what the plaintiff must allege to establish his case is not new matter. *Burr v. Union Surety etc. Co.*, 86 App. Div. 545.

An answer which purports to be a defense to the entire cause of action, and which answers only a part of it, is demurrable. *Breyfogle v. Stotsenburg*, 148 Ind. 552.

The New York Code Civ. Proc. (§ 508) permits a partial defense if the defendant states it to be such. *Bernascheff v. Boeth*, 34 Misc. 558. If not so stated, and if it will not stand the test as a complete defense, it is subject to demurrer. *Butler v. General Acc. Assee. Co.*, 103 App. Div. 273; *Loos v. McCormack*, 46 Misc. 144. Matter tending to mitigate or reduce damages is a partial defense. *Gaboy v. Doane*, 77 App. Div. 413.]

declaration.(c) It may be added too, that a special plea in bar, alleging matter of *estoppel*, neither confesses nor denies the truth of the declaration; though like other pleas in bar, it virtually denies the *right of action* (d), by denying the plaintiff's right to *allege* the facts stated in the declaration.

For the purpose then of defining, more precisely, a special plea in bar, it may perhaps be sufficient to say, that it is a plea, which alleges *new or special* matter, in bar of the action, and concludes with an *averment*.(e) It admits on general principles heretofore explained, the truth of all the plaintiff's *traversable* allegations, which it does not traverse, and goes in *avoidance* of what it admits.(f)

Special pleas in bar are usually in *affirmative* language; but not universally so. To a *negative* covenant, for example, the plea, by which the defendant shows that he has kept his covenant, is in the *negative*; as that he has *not* done what he covenanted against.(g)

As every special plea alleges *new* matter; it must, regularly, conclude with a *verification* and a prayer of judgment.(h) For according to a principle heretofore stated, all pleading,

(c) Hob. 104; 2 Chitt. Pl. 510; Bac. Abr. *Pleas*, &c., H. 3.

(d) 3 Black. Com. 308; Willes, 13; Lawes' Pl. 38, 130, 140, 161, 170; 3 East, 346.

(e) The term, 'averment,' when used as above, to express the *manner of concluding* any pleading, signifies *the* averment, 'this he is ready to verify'; and in this sense is synonymous with the word, 'verification.' But in its more general acceptance, it has the same meaning as the word 'allegation.'

[The answer should disclose the defense, whether by denial or new matter, without reference to any other pleading. It should be complete in itself without amplification or patching from fragments of the complaint. The opposite party and the court should not be required to count lines and measure paragraphs to discover the matters put in issue. *Baylis v. Stimson*, 110 N. Y. 621].

(f) Bac. Abr. *Pleas*, &c., H. 4; 1 Salk 91; 1 Wils. 338.

(g) 3 Black. Com. 309; Co. Litt. 303, b; Bac. Abr. *Pleas*, &c., I, 3.

(h) 3 Black. Com. 309, 310; Lawes' Pl. 145, 159; 1 Saund. 103 (n. 1.); Carth. 337; 2 Wils. 66; 2 T. R. 576; 2 Burr. 772; Cowp. 575. See *supra* VERIFICATION.

subsequent to the declaration, and alleging new matter, must be *left open*—in order that the adverse party may have an opportunity to answer it, as he pleases.

But there is no necessity of concluding any plea, *merely negative*, with a verification: it may conclude with a prayer of judgment only. *(i)* For a verification, being an *offer to prove* the allegations to which it refers, cannot, in strictness, be required of him who pleads in the negative; because he, who takes the *negative* in pleading, is, regularly, not bound to *prove* it: the burden of proof, by the general rule, being upon him who takes the *affirmative*. *(j)*

When the defendant alleges *distinct* matters of defence to *different parts* of the declaration, or cause of action (as where in an action to recover a debt, he pleads payment of part, and a tender of the residue), he may either conclude each distinct matter of defence, with a separate verification, or all of them together, with a *single general* one. *(k)*

It is said to be a universal rule, that every good defence to the action, which cannot be pleaded *specialy*, may be given in evidence under the *general issue*. *(l)* It must follow, therefore, on the other hand, that every such defence, which *cannot* be give in evidence under the general issue, may be *specialy pleaded*. Otherwise the defence, though admitted to be sufficient in law, would necessarily be lost to the defendant.

But a special plea *amounting to the general issue*—i. e. a plea alleging new matter, which is in effect a *denial* of the truth of the declaration—is, in general, improper and inad-

(i) Co. Litt. 303, a; Willes, 6, 7; Lawes' Pl. 145.

(j) Though under the New York Code, we have no conclusion,—(either with, or without, verification,)—understanding when, at common law, the matter set up in an answer *would have* required a conclusion with a *verification*, will enable a party to *prepare for proving*, at the trial, what he is bound to prove.

(k) 1 Saund. 336, b; 339 (n. 8); 1 Salk. 298, 312; Carth. 43.

(l) Lawes' Pl. 111.

missible.(m) If therefore in trespass, the defendant pleads specially an *alibi*—or *title* in himself or a stranger, to the property in question—or in trover, that he took the goods as a *distress* for rent, &c. the plea is improper: because in each of these cases, the matter pleaded is virtually a denial of the truth of the declaration. The proper plea, therefore, in each of them, would have been the general issue.(n) So also, where in trover, the defendant pleaded *title* in himself, to the goods, the plea was held ill, as amounting to a denial of the *conversion*, which is the gist of the action, and therefore as tantamount to the *general issue*.(o)

The ground of objection to a plea of this kind is, that it tends to unnecessary *prolixity* in the pleadings, and refers to the *court*, instead of the jury, matter of mere *fact*—matter which goes in *denial* of the declaration, and not in *avoidance* of it.(p) The fault in the plea, however, is not in its *sub-*

(m) 10 Co. 95, a; Com. Dig. *Pleader*, E. 14; 3 Black. Com. 309; Bac. Abr. *Pleas*, &c., G. 3; Co. Litt. 303, b; Hob. 127; 1 Salk. 394; Cro. Car. 157.

[In illustration, see, *Richmond, etc., R. Co. v. N. Y. etc. R. Co.*, 95 Va. 386, where pleas were rejected because the evidence to support them was admissible under the general issue already pleaded.

Special pleas which are equivalent to the general issue may be objected to by special demurrer or stricken out on motion. *Wadhams v. Swan*, 109 Ill. 46, 54. And as to an answer similarly objectionable, see, *Ugla v. Brokaw*, 77 App. Div. 310.

If it be any matter of defense which denies what the plaintiff on the general issue would be bound to prove, it may and ought to be given in evidence under the general issue; but if it be any ground of defense which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, it may be specially pleaded. *Thayer v. Brewer*, 15 Pick. 217, 219. And see *Bloomington Canning Co. v. Union Can Co.*, 94 Ill. App. 62.

But a special plea alleging facts which will maintain the defense under the general issue is not necessarily equivalent to the general issue. *Deweese v. Manhattan Ins. Co.*, 34 N. J. L. 244].

(n) Id.; Yelv. 174. b. (n. 1.)

(o) Cro. Car. 157.

(p) Hob. 127; Bac. Abr. *Pleas*, &c. G. 3.

stance—(for whatever denies the declaration is *substantially* a sufficient answer to it) ; but in its *form* only. (*q*)

But the above general rule is subject to three exceptions, or qualifications:—

a. A special plea, amounting to the general issue, is good, if it contains special matter of *justification* (*r*). In other words, an *entire* special plea, answering the *whole* declaration, and alleging matter of *justification*, is good ; although, as to *part* of the declaration, it amounts to the general issue. For matter of *justification* is matter of *law* (*s*), which ought to be referred by the plea, to the *court*. And therefore such matter, when it goes in avoidance of a *material part* of the declaration, is allowed to be pleaded specially, though as to some *other part* of the declaration, it may amount to a mere denial. For, as the matter of *one entire* plea cannot be separated, by a reference of one part of it to the jury, and of the other to the court, and as it would be at least as improper to refer matter of law to the jury, as matter of fact to the court ; the defendant is allowed to refer *the whole* to the latter. Thus, in trespass for entering the plaintiff's close, treading down his grass, and driving his beasts to places unknown, so that they could not be

(*q*) 10 Co. 95. a; Bac. Abr. *Pleas*, &c. G. 3; Com. Dig. *Pleader*, E. 14; Hob. 127. & note (2) by Williams; 1 Freem. 39.

Since the adoption of the Code, it has been held that a special defence, which consists of matter that goes to *disprove* any material allegation in the complaint, is defective, as *amounting to a denial*. It should be proved under a denial, (general, or special, as the case may be.) 6 How. Pr. 307. But see 9 How. Pr. 289; 3 Duer, 684; 21 Barb. 190.—On principle, the rule in 6 How. 307 seems the true one.

(*r*) 3 Lev. 40; Bac. Abr. *Pleas*, &c. G. 3; *Trespass*, I. 3. (2); Cro. Eliz. 268; Esp. Dig. 318.

(*s*) In this, as in other rules, pointing out what should, and what should not, be pleaded specially, 'matter of law' is synonymous with 'matter of avoidance,' as distinguished from matter of *denial*. Hence, whatever amounts to a *denial* of the adverse party's allegations, is termed 'matter of fact,' whatever *confesses and avoids* them, 'matter of law.'

replevied, the defendant pleaded that the *locus in quo* was his own waste, (in which, as appeared in another part of the pleading, the plaintiff had a right of common); and that the beasts of the plaintiff were there, intermixed with the beasts of strangers, which had no right there; and that because the latter could not there be separated from the plaintiff's beasts, the defendant drove them all to a pound in the waste to separate them, and having separated them, left the plaintiff's beasts in the waste: on demurrer to this plea, as amounting to the general issue, the court held, that though the allegation, that the *place where* was the *defendant's* waste was a mere *denial* of his alleged entry into the *plaintiff's* close; yet as it was a necessary part of the defendant's *justification*, in *driving the plaintiff's beasts to the pound*, (which was part of the alleged trespass); the plea, being entire, was good. (t)

b. The general rule under consideration admits of another exception, (or rather an *evasion*), in *trespass qu. cl. fr. and assise*—in which, though a simple plea of a possessory *title* in the defendant is ill, as amounting to the general issue; he may, nevertheless, plead that defence, if the plea gives *color* to the *plaintiff* (u) To give color to the plaintiff, is to assign to him, in the plea, some *colorable* (i. e. *defective*), but *fictitious* title, of which (it being matter of law), the jury is incompetent to judge—in order to justify, in opposition to it, a special statement of the *defendant's* title; so that the question, which is the *better* title of the two, may appear, upon the face of the

(t) 3 Lev. 40.

The more simple and better mode, however, of pleading in such a case, would be to plead, as to that part of the declaration, which the defence *contradicts*, *not guilty*, and to plead the special matter of justification, in avoidance of the *other* part only.

In New York under the Code, the matter of pleading, given in the example, would be right; and 'giving color,' (as by the next five sections,) is *not* allowable.

(u) 3 Black. Com. 309; Lawes' Pl. 51, 126-7, 150; 10 Co. 90, 91; 8 T. R. 404; Bac. Abr. *Pleas*, &c. I. 8; *Trespass*, I. 2.

plea, as a question of law (*v*). And thus, by alleging a *fictitious* and *defective* title in the plaintiff, which cannot be traversed, the defendant is enabled to plead specially what, *in fact*, is neither more nor less than the general issue. He may, for example, plead a possessory title in himself, under a feoffment with livery, from A. (which plea would, *by itself*, amount to the general issue), provided he adds, that the plaintiff entered, claiming title under *color* of a certain prior deed of feoffment, *without livery*, by which nothing passed: in which case, the title, alleged in the plaintiff, is clearly defective, at common law. (*w*)

The colorable title alleged to be in the plaintiff, in a plea of this kind, is not traversable. (*x*) Indeed if the title, which the defendant alleges in himself, is in law a sufficient bar; a traverse, by the plaintiff, of the fictitious title assigned to *him* in the plea, would seem necessarily fatal to his action: since it would imply a *confession* of the defendant's title, as alleged in the plea. But the plaintiff is at liberty to contest the alleged title of the *defendant*, in the same manner in which he might contest any other matter, pleaded specially in bar, in the usual way. (*y*)

If the defendant, when intending to give *color* to the plaintiff, assigns to him a title, *sufficient* for the maintenance of the action; the plea is necessarily ill (*z*): since it is, in effect, a *confession* of the plaintiff's right of action.

There is no use in pleading title specially, and giving color, except where the defendant wishes—instead of submitting his defence to the jury, under the general issue—to have the question of title presented distinctly upon *the face of the pleadings*; to the end that it may be the more formally and

(*v*) Id.; Com. Dig. *Pleader*, 3. M. 40, 41; 2 Chitt. Pl. 555-6.

(*w*) 2 Chitt. Pl. 555-6.

(*x*) 1 Chitt. Pl. 501.

(*y*) 3 Black. Com. 310; Lawes' Pl. 150.

(*z*) Com. Dig. *Pleader*, 3. M. 40; Cro. Jac. 122.

deliberately judged of by the court; and that he may, with the more ease and certainty, take advantage of any error in law, that may intervene

c. According to various authorities, a *special* plea, amounting to a denial of the declaration, and *without* giving color may in some cases be allowed, at the *discretion* of the court. (a) The cases, in which such a plea is held to be thus allowable, are those in which the matter pleaded is such as may 'breed a scruple, in the *lay gents*'—or, in more familiar language, such as is likely to perplex a jury, and therefore unfit to be determined by them.

In regard to the *manner* of excepting to a special plea amounting to the general issue, when not thus allowable, there is some apparent contrariety of opinion in the books. According to one class of authorities, such a plea is *demurrable*. (b) But according to other opinions equally respectable, it is held that the fault in question is not a proper cause of *demurrer*; and that the only proper mode of taking exception to the plea is by a *motion* to the court for an order, that the *general issue*, or a *nil dicit*, be entered (c): and that if the order is made, the defendant must enter the general issue, or the plaintiff may take judgment, as by *nil dicit*. (d)

The question, whether this latter course, or that of demurring is the proper mode of excepting to such a plea, appears manifestly to depend upon the correctness or incorrectness of the rule, (before stated), asserting a *discretion* in the court, in regard to the allowance of it. If such a discretion can leg-

(a) Hob. 127; 1 Leon. 178; Com. Dig. *Pleader*, E. 14; Bac. Abr. *Pleas*, &c. G. 3, *Trespass*, I. 2; 2 Mod. 274.

(b) 10 Co. 95. a; Cro. Car. 157; Cro. Eliz. 147; Bac. Abr. *Pleas*, &c. G. 3. N. 6; *Trespass*, I. 3, (2); Com. Dig. *Pleader*, E. 14.—*Vide* 4 B. & C. 547; 4 Bing. 470.

(c) Hob. 127; 1 Leon. 178; Cro. Jac. 165; Bro. Ab. *Traverse*, pl. 14; 2 Mod. 274; Com. Dig. *Pleader*, E. 14; Bac. Abr. *Pleas*, &c. G. 3; *Trespass*, I. 2, (2); 2 Day, 431; Esp. Dig. 413.

(d) Bac. Abr. *Tresp.* I. 2. (2); Cro. Jac. 165.

ally be exercised, by the court, (and it has been actually exercised by high and repeated authority); the proper mode of objecting to the plea must be by motion . . . For questions raised by a demurrer are *stricti juris*, and admit of no discretion.

The objection to a plea of this kind has, however, been taken, and the question decided, in each of the above modes. And perhaps the most satisfactory view of the subject will be found to be, that the proper mode of objecting to the plea is, in the first instance, by *motion*—and upon this supposition, if the plaintiff should *demur*, instead of *moving* the court, the defendant would not be bound to join in the demurrer; but might still refer the question to the *discretion* of the court: but that if, on the plaintiff's demurring, the defendant *accepts* the demurrer, by *joining* in it, and thus *waives* his right to appeal to the discretion of the court; the question may be decided under the *demurrer*. This supposition, if correct, may serve to explain how it happens, that two such dissimilar and apparently inconsistent modes of excepting to pleas of this kind, have been pursued; since according to this view of the subject, each of those modes may, under different circumstances, be correct. (e)

Not only *special* pleas, amounting to the general issue, but also pleas which allege *no new* matter, and which expressly and merely *deny* the declaration, but which vary, in their form and terms, from the general issue, are in general not allowable. The reason for disallowing pleas of this kind is not, however, that they tend to inconvenient *prolixity*, or that they refer matters of fact to *the court*—(for they are not, like pleas of the former class, liable to either of those objections); but that they lead to *innovation and confusion*, in the established modes of pleading, and tend, not only to destroy the settled distinctions between the different species of pleas, but also to the introduction of *new* pleas, unknown to the law.

(e) *Vide* 10 Co. 95. a; Bac. Abr. *Pleas*, &c. N. 6; Yelv. 174. b. *note*.

If therefore to a declaration, alleging the beating of J. S. the plaintiff's servant, by reason whereof he lost *the service of J. S.*, the defendant pleads that the plaintiff *did not lose the service of J. S.*, the plea is ill. (f) For the loss of service, being the *gist* of the action; the plea is, essentially, the *general issue*, in an argumentative and improper form. So also, where in trespass for entering the plaintiff's garden, the defendant pleaded that the plaintiff *had no such garden*—and where, in trespass for depasturing the plaintiff's herbage—the defendant pleaded, that he *did not* depasture the plaintiff's herbage—the pleas were, respectively, held to be ill, for the same reason. (g)

Although, as has before been shown, a special plea, alleging the *possessory title* to be in the defendant, and not giving color, is ill, as amounting to the general issue, in trespass *quare clausum fregit*; yet the plea of *liberum tenementum*, (that the *locus in quo* was the defendant's freehold), has, by a long series of authorities, ancient and modern, been sanctioned, as a good special plea in that action, though it never gives color. (h)

(f) Bac. Abr. *Tresp.* I. 2. (2); Bro. Ab. *Trav.* pl. 378.

(g) 10 H. 6. 16; Doct. Pl. 42.

(h) 1 Saund. 299. b. (n. 6.); Com. Dig. *Pleader*, 3. M. 40, 41; Willes, 218; Lawes' Pl. 128; 2 Chitt. Pl. 551–3; 2 Black. R. 1089; 2 Salk. 453; 1 Ld. Ray. 333; 7 T. R. 335.

For the purpose of explaining why this latter plea does not amount to the general issue, it must be observed that every trespass upon property is an invasion of another's *possession*; and that the action of trespass, which is called a *possessory* action, is so called, because it is founded upon a *possessory title*. Every plea, therefore, which denies *such* a title in the plaintiff, whatever may be its form, is in effect *the general issue*. But the plea of *liberum tenementum*, or, (as it is frequently called) 'the *common bar*,' is perfectly consistent with the existence of a *possessory title* in the plaintiff; since a *freehold* in one person, may co-exist with an actual and rightful *possession* of the same subject, in another. The freehold, for example, may be in A., while B. is in rightful possession, under a subsisting term for years, or otherwise; or the latter may, without any derivative title, be in the actual and quiet possession, which of itself

A special plea, alleging facts which would, in *evidence*, maintain the general issue, does not, in all cases, and neces-

confers a possessory title against all persons, except him, who has the right of possession. And as the plea in question does not deny such a title in the plaintiff, it does not amount to the general issue.

But although these considerations do, indeed, show that the plea of *liberum tenementum* does not amount to the general issue; they also seem to show that, on strict principles, the plea is *defective in substance*—as some highly respectable opinions hold it to be; (*vide* Willes, 222; 1 Saund. 299. c. (n. 6.): inasmuch as it impliedly admits a *possessory title*, and consequently a right of action, in the plaintiff. Indeed, it is difficult to understand how the matter of this plea could ever have been supposed to be a strict and full bar to the action. And it appears to have been sanctioned, not so much on account of its own inherent sufficiency, as from a kind of *necessity*—that is to say, from its being the only means of protecting the defendant against a *disadvantage* to which he would otherwise be exposed, from the ancient mode of declaring in trespass *quare clausum fregit*. For formerly, the almost universal mode of describing the plaintiff's close, in this action, (a mode, which still may be, and sometimes is pursued, 2 Chitt. Pl. 385-6, 387, (*note n.*); 2 Black. R. 1089; 1 Saund. 299. b. c. n. 6.), was merely to mention it as the plaintiff's 'close at A.,' or his 'close lying in the parish of A.' without giving its name or abutments, or any other designation. The consequence was, that the defendant could not discover from the declaration in *what particular* close within the parish named, the plaintiff intended to prove the alleged trespass; and consequently, could not know, with certainty how to frame his defence. He was, therefore, allowed to plead that the close, mentioned in the declaration, was 'his close, soil and freehold,' 2 Chitt. Pl. 551-2; Com. Dig. *Pleader*, 3, M. 34, without giving it any name, or further description. For the description of the close, in the declaration, being *general*; that in the plea was allowed to be equally so: and hence the plea was called the *common* (*i. e. general*) bar; the *main object* of which was, and still is, (though it may be useful for certain other purposes, 2 Chitt. Pl. 551. (n. s.); 8 T. R. 404), to drive the plaintiff to a *new assignment* of the trespass, and thus to compel him to *particularize* his close—so that the defendant may know how to adapt his defence to the actual ground of complaint: an object easily attained, in most cases. For if the plaintiff *traverses* the plea; the defendant, by proving a freehold in himself, in *any* close within the parish or vill named in the declaration, supports his plea, and defeats the action. And when the plaintiff has made a *new assignment*, which is in the nature of a

sarily, *amount* to the general issue. For no plea—whether it admits or denies that there was once a *right of action*—can properly be said to amount to the general issue, unless it goes in *denial of the declaration*.

Thus in assumpsit—*payment—release, accord, &c.* all which admit that the alleged cause of action once existed—as also, *infancy, coverture, duress, usury, &c.* which deny that it ever existed, may respectively be pleaded specially; although each of these defences would, in *evidence*, maintain the general issue. (i) For they all *admit* the truth of the declaration.

And this right in the defendant, either to *plead* special matters of defence, or to give them in evidence under the *general issue*, exists, to a great extent, as has been shown in actions of *trespass on the case, ex delicto*. (j)

Every special plea must contain *issuable* matter (k); for the plain reason, that it would not otherwise be *triable*. The same rule extends to all special pleading, in all its stages. If therefore, in debt or assumpsit, the defendant pleads only that he was *ready* or *willing* to pay according to his contract; the plea is ill—because the fact averred is not *issuable*. Such a plea would indeed be ill for another reason, viz. that the fact of mere readiness, or willingness, is *immaterial*; since it is neither a *performance* nor a *discharge* of the contract. Its not being *issuable*, is, however, a sufficient objection to it.

On the same principle, every special plea, in which matter

new declaration; the defendant may, in his rejoinder, plead to it, as to an original declaration. A complaint, that defendant broke, &c., plaintiff's close, in *such a town*, would in New York be sufficient; and if the defendant wished for a specification as to place, he must, by motion to the court, procure an order that the complaint be made more definite.

(i) 1 Ld. Ray. 88-9, 566; 1 Salk. 394; 3 Ib. 273; 5 Mod. 18; Com. Dig. *Pleader*, E. 14; Chitt. on Bills. 197-8; Lawes' Pl. 112; Tidd. 591, 599; Sayer, 270.

(j) 3 Burr. 1353; 1 Chitt. Pl. 486-7; 1 Black. R. 388; 1 Wils. 45; 8 East, 308; 2 Phil. Ev. 108.

(k) Lawes' Pl. 137-s; 2 Wils. 74.

of fact and matter of law are so *blended*, that they cannot be separated, is ill. (l) If therefore, to trespass for false imprisonment, the defendant pleads that he arrested the plaintiff, *by lawful authority*, without showing what the authority was; the plea is bad, as not being issuable. For a traverse of the plea would put in issue all matters of *law*, as well as of fact, which might conduce to show the defendant's authority: whereas matter of *law* is never issuable. The plea, in such a case, ought to state the defendant's authority *specially*—not only that its legal sufficiency may be judged of by the court, from the record; but also that the plaintiff may be enabled to *traverse*, distinctly, the matter of fact alleged in it. So also where the defendant, being bound by a condition, to produce to the plaintiff a *sufficient discharge* of a certain demand, pleaded that he had produced 'a sufficient discharge,' without stating *its tenor or contents*, the plea was held ill, on the principles above stated. (m)

A plea in bar, pleaded to the *whole* declaration, must contain a sufficient answer in law to the *whole* gravamen, or cause of action: otherwise it is ill for the whole (n); and the plaintiff

(l) 9 Co. 25. a; Lawes' Pl. 138; 2 Mod. 55.

(m) 9 Co. 25. a.

In New York under the Code, the examples here given would be *bad*;—as not stating *any definite fact*.

(n) Co. Litt. 303. a; 1 Saund. 28. (n. 2.); 2 Ib. 50, 127, 210, b. c. (n. 1.); Yelv. 225; Com. Dig. *Pleader*, E. 1; Lawes' Pl. 135, 171, Cro. Eliz. 268, 331; Cro. Jac. 27; 5 T. R. 553; 1 Lev. 48.

Every plea must answer the whole declaration or count, or rather all that it assumes in the introductory part to answer, and no more. But this difference arises from the *form* of the plea, namely, if a plea *begin* with an answer to the *whole declaration*, but in truth the matter pleaded is only an answer to *part*, the whole plea is bad, and the plaintiff may demur. But if a plea begin only as an answer to *part*, and is in truth but an answer to *part*; or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for *that* as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued. But this rule must be understood with this limitation, that the part of the declaration which is not answered by the plea is material, and

is entitled to recover for the *whole*. Thus, if in trespass for assault, battery and *mayhem*, the defendant pleads to the whole, matter which is in law a justification of the *assault and battery only*; the plea is ill *in toto*, and the plaintiff is entitled to damages, as well for the *assault and battery*, as for the *mayhem*. For an *entire* plea, going to the *whole* declaration, is *indivisible* in its effect; and cannot operate as a bar to any *part* of the cause of action, unless it constitutes in law a bar to the *whole*.(o)

Thus also, if to an action of trespass, the defendant pleads a justification, (as a license), on any day *different* from that laid in the declaration; he must traverse the commission of the trespass on any *other* day, either before or after that mentioned in his plea, and before the commencement of the suit. (p): otherwise the defence will not be *co-extensive* with the declaration; or in other words, will not cover the *whole time*, within which the plaintiff is at liberty to prove the

the gist of the action; for where any thing is inserted in the declaration as *matter of aggravation*, the plea need not answer or justify *that*; for the answering of that which is the gist of the action will cover the whole declaration. 1 Wm. Saund. (6th ed.), 28, a. b. c.; 1 Williams' Notes to Saund. 24.

[Every answer under the Code must be as full and complete as a special plea was required to be at common law. *Ayrault v. Chamberlain*, 33 Barb. 229].

(o) The rule of common-law pleading;—that if a plea be made to the *whole* declaration, (*complaint*, under the Code,) when, in fact, the defence as stated covers but a *part* of the *gravamen*, (or *gist* of the action;) the plea is *ill as to the whole*,—and plaintiff takes judgment for the whole;—this must still remain the rule, under the Code: for still, as at common law, there is a good cause of action *unanswered*,—or *confessed*. See 4 How. Pr. 413; 10 Ib. 67, 222; 13 Ib. 360; 14 Ib. 46, 456; 6 Ib. 433; 8 Ib. 441; 17 Barb. 260; 20 Barb. 339. *Otherwise*, as to a *counterclaim*. That *may* be but to *part*, and good *pro tanto*, resembling a set-off. 5 Duer, 332. As to *part payment*, &c., see 16 N. Y. 297. *It must be set up, in the answer*:—cannot be proved under a denial.

(p) Hob. 104; Bac. Abr. *Pleas*, &c. H. 4; 1 Saund. 14, 298, (n. 2.); 2 Ib. 5. a. (n. 3.); 1 T. R. 636; 1 Chitt. Pl. 534. *Post, Traversee*.

trespass complained of. For the day in the declaration being immaterial; the plaintiff has a right to prove the trespass on *any* day before the date of the writ. But the justification, if true, applies only to *the particular* day, laid in the plea—and without the traverse, would therefore imply an admission, that the trespass complained of was committed on any *other* day than that. Upon the same principle, if the defendant in trespass pleads a *release* on a particular day; he should traverse his guilt, as to all *subsequent* time, before the commencement of the suit: or if he pleads *title*, acquired by himself—as by a feoffment—on a particular day; he should traverse, as to all *previous* time (*q*): otherwise, the plea will not cover *all* the time covered by the declaration. (*r*)

The general principle above stated, that an *entire* plea is indivisible, extends to all the subsequent pleadings; and therefore an entire replication, if bad for *part* of the plea—or an entire rejoinder, if bad for part of the replication, is so for the *whole*. (*s*)

Upon the same principle, if two co-defendants *join* in a plea, which is in law a sufficient justification for *one* of them only; it is bad as to *both* of them. (*t*) If, therefore, an arrest is made under *irregular* process, (which though irregular, justifies the *officer* executing it, but not the *party* who prayed it out)—and in an action for false imprisonment, against both of them, they *join* in a plea, justifying the arrest by virtue of the process; judgment must go against *both*. For

(*q*) Hob. 104; Bac. Abr. *Pleas*, &c. H. 4.

(*r*) See *Supra*, *Rules of Pleading*. In cases like these two last, however, the simpler and better, and at this time the more usual, mode of pleading is, to divide the defence into *two* pleas, by pleading as to all time, *except* the day or time covered by the justification, or other matter of avoidance, *not guilty*, concluding to the country; and as to *that* day or time, by pleading the matter of justification, &c. *specially*, with a verification. (2 Chitt. Pl. 519, 520. n. y.)

(*s*) 1 Saund. 28. (n. 2.); 2 Ib. 127; 1 T. R. 40.

(*t*) Stra. 509, 993, 1184; 1 Wils. 17; 3 T. R. 377; Cas. Temp. Hardw. 62, 69; 3 Mass. 312.

the plea, which is *joint*, being ill *quoad* one of them, is consequently ill for both. The officer should have pleaded *separately*.(u)

But though the defence must, in all cases, answer the *whole* declaration, or alleged cause of action; it is not necessary that the whole be answered by *one* plea. It is necessary only, that the *whole* matter of defence pleaded, cover the *whole complaint*. The defendant may, therefore, plead several different matters of defence, in several *different* pleas, to as many *different parts* of the declaration, or alleged cause of action. And if all the pleas, taken together, form a sufficient answer to the whole matter of complaint; the defence is complete.(v)

Thus, in trespass for cutting down *ten* of the plaintiff's timber-trees, the defendant may plead, as to all the trees except *one—not guilty*; and as to the remaining one, any matter of *avoidance*—as a license, or other justification; or a *release*, a former recovery, &c. So also in debt, or *assumpsit*, for 1000 dollars, the defendant may plead as to 500 dollars, (parcel of 1000), *nil debet*, or *non assumpsit*; and as to the residue, *release, payment, tender*, &c.: or he may plead several *special* pleas to different parts of the demand—as

(u) The New York Code would, in the case stated, probably render it necessary to proceed to trial: as, under that, a judgment may be *for one* defendant and *against the other*. Such an answer would not admit of a reply; and the trial would be on the *whole answer*, and *whole complaint*, as to *both defendants*. 3 Seld. 459.

(v) [*Probate Court v. Potter*, 25 R. I. 204, 207, where the court said: "We think the rule may well apply here, where, instead of the cause of action being severable, the question of interest of two separate persons is involved. It makes little difference whether the defendant says, in one plea, A.'s interest in the estate and his capacity to carry on this suit have terminated, and in another plea, filed simultaneously, B.'s interest in the estate, &c., has terminated; or in one plea, the interest of A. and the interest of B. have terminated. The two pleas together submit a substantial defence as well as the one plea combining the two averments does." It was held here that a complete defence was presented when a plea *puis darrein continuance* was joined with other pleas, and the plaintiff was required to reply].

payment of part and *tender* of the residue (*w*): or finally, he may *plead* to part of the declaration, and *demur* to the residue. (*x*) Thus, if in covenant broken, the declaration alleges two breaches, one of which is well assigned, and the other ill; the defendant may *plead* to the former assignment, and *demur* to the latter. (*y*)

Every plea to the action is taken, as extending to the *whole* declaration or gravamen, unless *expressly* limited to a *part* of it, by beginning *as* an answer to a part only. And as to the *mode of taking advantage* of a plea, which does not answer the whole ground of the complaint, the three following rules are to be observed:—

a. Where matter, pleaded as an answer, to the *whole*, is in law a good answer to a *part only*, the proper mode of excepting to it is by *demurrer* (*z*)—as in the case before mentioned, where to assault, battery and *mayhem*, the defendant pleads to the *whole*, what is an answer in law to the *assault* and *battery only*. So also, if in an action against a bailee, for goods delivered to him ‘to keep and carry,’ he pleads to the *whole* declaration, that he was discharged from *keeping* them, without answering his obligation to *carry*; the plea is *demurrable*. (*a*) For in these cases, the ground of objection to the plea is, not that it is *irregular and inadmissible*; but merely that it is *insufficient* in law. And such is the proper course for the plaintiff, whenever a plea, purporting to be an answer to the *whole* declaration, (as it does of course, unless expressly

(*w*) Co. Litt. 304. a; Lawes' Pl. 107; Bac. Abr. *Pleas*, &c. K. 1. N. 1.

(*x*) Bac. Abr. *Pleas*, &c. N. 1.

(*y*) Demurring to *part* and pleading to *part*, are thus allowed, when *each* of such parts is, (in effect,) a *substantive cause of action*;—as in the example of two breaches. And the same thing is expressly allowed by the Code. 5 Sandf. 210; 12 Barb. 9. But a defendant cannot *demur*, and *answer*, to the *same matter*. 12 How. Pr. 563.

(*z*) 1 Saund. 28. (n. 3.); 1 Salk. 179; 1 Stra. 303; Lawes' Pl. 135–6.

(*a*) Id.

limited, as mentioned above), is in law a sufficient answer to *part* of it only.

b. But if the plea *purports* to answer only a part of the declaration, and is in law a sufficient answer to that part only, the other part being left unanswered—(as if, in an action like that stated above, against a bailee, for goods delivered to him to be *kept and carried*, he pleads, *as to his undertaking to keep*, that he was discharged thereof, without answering, in any way, the other part of his undertaking); the plea is *void*, and of course considered as *no* plea. The plaintiff therefore should not, in such a case, *demur*; but should sign judgment, as by *nil dicit*, that is, as for *want of a plea*.(b) For such a plea, being considered in law as *no* plea, is a *discontinuance*, on the defendant's part. And therefore, if the plaintiff *accepts it* as a plea, by demurring to it, he *discontinues the whole* action.

To explain the reason of this rule, it must be observed that the court has no right, in any case, to determine any one *part* of an entire cause of action, leaving the rest undecided. The *whole* must be, in some way, determined: otherwise a single right of action might require several suits. If then, the defendant makes answer to only *a part* of the plaintiff's com-

(b) Com. Dig. *Pleader*, E. 1; 1 Saund. 28. (n. 3.); Gilb. H. C. P. 158; 1 Salk. 179, 180; 1 Stra. 302; 2 Ld. Ray. 841; 7 Mod. 124; 4 Co. 62. a; 1 Selw. N. P. 5, (n. 7.); Lawes' Pl. 135-6.

As to the case put in the former paragraph, the New York Code, (§ 508,) would there call on the plaintiff for a *demurrer*.—While, as to the case put in this paragraph, it would seem that, upon principle, the plaintiff might move for judgment, as on an answer *not relevant* to the *whole* complaint, and *confessing* a cause of action by *not* answering it.

By the well-settled rules of pleading at common law, if a defendant failed by his plea to answer the whole of the substantial allegations in any one count, or entirely omitted to plead to any count in the declaration, the plaintiff had a right to take judgment as to so much of the declaration as was not covered by the plea, as upon a *nil dicit*. 1 Wms. Saund. 6th ed. 23 b; *Parker v. Parker*, 17 Pick. 236; *Dwight v. Holbrook*, 1 Allen, 560; *Case v. Ladd*, 2 id. 130; *Hogan v. Ross*, 13 How. 173, 182; *Aurora City v. West*, 7 Wall. 82, 91.

plaint; the answer is regarded as *no plea*; because it does not enable the court to determine the whole. It is therefore tantamount to a *nil dicit*, and *discontinues the whole defence*. It results then, that if the plaintiff, who has a right to treat such an answer as a nullity, *accepts it* as a plea, by demurring or pleading to it; and thus, in effect, prays judgment for only *a part* of his cause of action; he *discontinues* his whole action.

c. And if the defendant pleads, to a *part* of the cause of action, matter which would be in law a sufficient answer to *the whole*, if *pleaded to the whole*; the rule is the same—and the plaintiff must not *demur*, but take his judgment, as in the preceding case, and for the same reason. (c) For though the matter pleaded be sufficient to bar the *whole* action; yet not being *pleaded to the whole*, it cannot be applied as an answer to the whole. If therefore, in trespass for cutting *ten* of the plaintiff's growing trees, the defendant pleads *as to all the trees, except one*, a release of *all* trespasses—or if in the case mentioned above, of a bailment of goods to be kept and carried, the defendant pleads, as to his undertaking to *keep*, a release of *all demands*; the plaintiff must sign judgment, as by *nil dicit*. Such appear to be the established distinctions, under this head.

Yet where a plea, beginning as an answer to only *a part* of the plaintiff's demand, not only alleged matter which in law would have been a bar in the whole, but, in the body of it, actually *answered* the whole—(as where in assumpsit on a note, payable by sixteen half-yearly instalments the defendant pleaded *as to all of them except the last*, that *none* of them had accrued within six years)—it was resolved that the plea was ill, on *special demurrer*, by reason of its *inconsistency*, in beginning as an answer to *part* of the demand, and actually

(c) 1 Stra. 302-3; 1 Ld. Ray. 231; 2 Saund. 28. (n. 3.); 4 Co. 62. a.

answering the whole. (d) for the court appear to have considered the *inconsistency* of the plea with itself, as rendering it *anomalous*, and as thus taking it out of the rule stated in the last section. (e)

But no plea is ever required to answer, expressly, any part of the declaration which is not of *the gist* of the action. Hence, matter of *aggravation*—as the *alia enormia*, in a declaration in trespass—requires no express answer. (f) Thus, where in trespass for assault and battery, the declaration, after alleging the assault and beating, adds, ‘and other wrongs to the plaintiff then and there did,’ a plea, justifying the *assault and battery only*, is a sufficient answer to the whole complaint.

Thus also, in trespass for breaking and entering the plaintiff’s house, and *expelling* him therefrom, or *destroying his goods*, a plea to the whole, and which in law justifies the *breaking and entering the house*, though silent as to the other alleged wrongs, is a good answer to the whole declaration: the breaking, &c. being the *gist* of the action; and the expulsion, &c. only matter of *aggravation*. (g) For as the action is, in its title, and consequently in its character, trespass *quare domum fregit*; the breaking, &c. of the house constitutes the whole *gist* of the complaint. Yet if the plaintiff, in the case now supposed, relies upon the *expulsion*, or the injury to his *goods* as a *distinct* ground of damages; he may, by a *new*

(d) 2 Bos. & P. 427.

(e) Such an answer would be good under the Code. Nothing, now, is anomalous; the exceptions have swallowed the rule.

(f) 1 Saund. 28 (n. 3.); 3 Wils. 20; 2 Ib. 313; 2 Campb. 175; 3 T. R. 297.

(g) 1 T. R. 479, 636; 3 Ib. 292; 3 Wils. 20; 1 H. Black. 555; 3 N. H. 511.

[By section 536 of the New York Code of Civ. Proc. it is provided that in an action for a personal injury “the defendant may prove at the trial facts not amounting to the total defense tending to mitigate or reduce the plaintiff’s damages if they are set forth in the answer, either with or without one or more defenses to the entire cause of action.”]

assignment of it in his replication, convert it into a substantive cause of action, and thus entitle himself to a recovery, notwithstanding the justification of the breaking of the house. (h)

Every *justification* pleaded must, expressly or tacitly, *confess* the act which it is intended to justify. (i) For it is absurd to plead in avoidance of a fact, which the plea does not *admit*. If therefore, to a declaration charging assault, battery and wounding, the defendant, *as to the assault and battery*, confesses, and justifies an act *not amounting to a battery*, with a *quæ est eadem transgressio*; the plea is ill, for the above reason; but ill only on *special* demurrer—as the fault is only formal. (j) The plea, in such a case, should be the *general issue*. (k)

(h) *Id.*

A *novel* or *new assignment* consists in alleging, with all necessary particularity, in the replication, facts which the declaration has alleged in *general terms*; and in this way, the plaintiff may convert into a *substantive* cause of action, what appears, in the declaration, as matter of mere *aggregation*—as in the example given in the text, (2 Chitt. Pl. 653–7; Lawes' Pl. 165; 1 Saund. 299. a. b. (n. 6.). A new assignment being in the nature of a *declaration*; the defendant may plead to it, *de novo*, as to a common declaration. (3 East, 294; Lawes' Pl. 165; 1 Saund. 299. a. b. (n. 6.)) A new assignment must, in general, conclude with an averment, that the wrongs, or causes of complaint, alleged in it, are *different* from those mentioned in the *plea*, (1 Saund. 299. (n. 6.); Lawes' Pl. 164–5, 240, 241): for otherwise a new assignment is unnecessary. And if the averment is untrue, the defendant may, for that cause, plead the *general issue* to the new assignment—as that issue involves a denial of the averment. (1 Saund. 299. c. (n. 6.); Lawes' Pl. 241.

(i) 1 Saund. 13, 14. (n. 3.), 28. (n. 1.); 1 Salk. 394; 3 T. R. 298; Carth. 380; Esp. Dig. 318.

(j) 1 Saund. 14. (n. 3.) 28, (n. 1.)

(k) *Otherwise*, as to *slander*, &c. under the Code. 9 How. Pr. 82; 17 Barb. 649. As to assault and battery, see 4 Sandf. 664, 680.

A plea is bad according to the settled rule of pleading, which professes to justify the whole slander, but falls short of a justification of every material part of it. Thus where the libel imputed to the plaintiff that he had been guilty of murder under circumstances of grave aggravation, and the plea stated simply that the plaintiff committed murder by killing his antagonist in a duel, this

Anciently, if the defence to an action consisted of matter of *avoidance*; it was necessary for the defendant to state specially, in his plea, *all* the particular facts, which constituted the defence, however, multifarious they might be. (1) And this rule is, undoubtedly, conformable to the strict principles of pleading. For each fact, essential to the defence, being matter of law, ought, in strictness, to be shown to the court by the plea. But from *necessity*, or at least for the avoiding of great *inconvenience*, this rule has been somewhat relaxed.

And now, as in declarations so also in special pleas in bar, *general* pleading is sometimes allowed, for the purpose of avoiding great *prolixity*: it being now an established rule, that no greater particularity can be required in pleading, than the nature of the subject will *conveniently admit of*. When therefore, one is sued on an obligation, binding him affirmatively to the performance of an *indefinite* number of acts, the particular recital of which would render the pleadings inconveniently *prolix*, he may plead performance, in *general* terms;

was held a bad plea. *Helsham v. Blackwood*, 11 C. B. 111. So a plea is bad which falls short of a justification of the slanderous words in the sense imputed to them by the declaration; for the plea necessarily confesses that such sense is correctly imputed; and if the defendant disputes this, he must do so under the general issue. The justification, however, will be complete if it covers the essence of the libel. *Tighe v. Cooper*, 7 E. & B. 639; *Alexander v. N. E. Co.* 6 B. & S. 340. So it is sufficient if it meets every thing which constitutes the substantial imputation on the plaintiff contained in the libel, without extending to every epithet, or term of abuse, which may be found in the description or statement of such imputation. But the justification must, it should seem, extend to every part which would by itself form a substantive ground of action for defamation. 1 Wms. Saund. 6th ed. 286; 1 Wms. Notes to Saund. 329; *Savage v. Powers*, 1 Wend. 451.

In actions for assault, or other injury to the *person*, the plea of not guilty merely denies that the defendant did the act complained of, and all matters in *confession* and *avoidance*, or in *justification* or *discharge* are required to be specially pleaded. 1 Chitt. Pl. 534, 535; 1 Taylor Ev. 3d ed. § 289.

(1) Co. Litt. 303; 8 Co. 133; Bac. Abr. *Pleas*, &c. I. 3.

and thus leave it to the plaintiff to assign any particular breach or breaches, in the replication. And as the breach or breaches, thus assigned, must be *specific*; the matter in controversy will of course be presented with sufficient certainty. *(m)*

Thus, if a sheriff executes a bond, with condition that he shall return *all* writs delivered to him, &c.; he may in an action on this obligation, plead performance in *general* terms, by averring that he has returned '*all* writs delivered to him,' &c. (pursuing the words of the condition)—without specifying any *particular* writ. *(n)* So also, where the defendant was bound in an obligation to deliver to the plaintiff, upon request, all the fat and tallow of all beasts, which he, his servants, &c. should kill before such a day—a plea, that upon every request made to him, he delivered to the plaintiff *all* the fat and tallow of all beasts, which were killed by him, his servants, &c. before the said day, without specifying any particular act of delivery, was adjudged sufficient. *(o)* So also, if the defendant is bound in an obligation, with condition that he should pay over to the plaintiff '*all* the monies which he should receive for the plaintiff,' within a certain time; it is a sufficient plea of performance, that he has paid over to the plaintiff '*all* the monies' so received, within that time. *(p)* Again: When the obligation is still more general—as that the obligor shall perform *all the duties* of a certain office, during a certain time, it is sufficient on his part, to plead that he has performed '*all the duties*' of the office, during that time. *(q)* And in all such cases, it becomes incumbent on the *plaintiff* to assign

(m) Cro. Eliz. 749, 916; Co. Litt. 303, b; Bac. Abr. *Pleas*, &c. I. 2; 1 Saund. 117. (n. 1.); 2 Ib. 410. (n. 3, 4.); 1 T. R. 753; 1 Sid. 215, 334; Sayer, 217.

(n) 1 T. R. 753.

(o) Cro. Eliz. 749.

(p) 2 Burr. 772; 1 Bos. & P. 640; 8 T. R. 459; 8 East, 85.

(q) 2 Saund. 403, 410. (n. 3.)

specially, in his replication, the breach or breaches on which he founds his right of recovery.

But this relaxation of the original rule before mentioned, extends only to cases, in which the acts required to be done, on the part of the defendant, are in some degree *indefinite*, or at least *not precisely ascertained*, either in the obligation sued upon, or in any other instrument referred to in it—as in the examples just stated, of an obligation to return all writs, &c.

If therefore, the condition of the obligation, on which the action is founded, requires the performance of acts, which, however numerous, are *specifically ascertained* in the instrument itself, or in any other instrument referred to in it; the defendant must plead specially the performance of *each* of the particular acts so ascertained.^(r) For in no such case, can it be objected, that the defendant is *unable* to specify each particular act of performance; and generally such a specification will not make the plea more *multifarious* than the condition itself, which enumerates the acts to be done. And therefore, if the defendant is bound, by the condition of a bond, to pay *all* the legacies contained in a certain will; he must enumerate them all, and specially allege payment of each of them; concluding with an averment, that those thus mentioned in the plea are *all*, that are contained in the will. Or if the condition be, that he shall enfeoff the plaintiff of *all* the lands described in a certain deed; he must plead in a similar manner, concluding with a similar averment.^(s)

In cases of this last kind, however, if the defendant pleads performance, in *general terms*, (as by averring that he did well and truly perform and fulfill all and singular the conditions,

(r) 1 T. R. 753; Cro. Eliz. 749, 916; 1 Saund. 116, 117. (n. 1.); 4 East, 344.

(s) 1 Bulster. 43; 1 Saund. 117. (n. 1.); 1 T. R. 753; Palm. 70; Kellw. 95, b. pl. 3.

&c.); the plea is ill, only on *special* demurrer.(t) For *performance*, in whatever manner alleged, being in *substance* a sufficient defence; the fault in the plea is only formal.

But to *negative* conditions or stipulations—as to a bond, condition for the keeping of *negative covenants*, general or other plea of ‘*performance*’ is never proper.(u) For ‘*performance*’, being a term implying some *positive* act, does not properly express the keeping of a mere *negative* condition or covenant. If, then, any of the covenants or stipulations, mentioned in the condition of an obligation, or in a deed of covenant, are in the *negative*; the defendant should plead, as to these, (and usually in the words of the condition or covenant), that he *has not done* any of the acts covenanted against.

Thus if a lessee, having covenanted, among other things, that he will not cut down any of the timber trees on the demised premises, nor suffer any of the buildings thereon to be injured for want of repairs, gives a bond for the performance of the covenants in the lease; in debt on the bond, his proper mode of pleading, as to these negative covenants, is, that he did *not* cut down any of the timber-trees, &c. nor suffer any of the buildings to be injured for want of repairs.(v) And if the covenant were more *general*, viz. that he would not *commit any waste*; he should still not plead that he had *performed* the covenant; but that he had not, in any manner, committed any waste. Yet if the defendant, in either of these last cases, pleads *performance affirmatively*, and in general terms; the fault in the plea is but formal.(w)

A special plea in bar, (after the formal introduction, technically called the ‘*defence*,’) begins regularly with *actionem non*—an averment that the plaintiff ought not to have, or maintain, his action—concluding with a *verification*,

(t) 1 Saund. 117. (n. 1.); Bac. Abr. *Pleas*, &c. I. 3.

(u) Co. Litt. 303, b; Esp. Dig. 305; Bac. Abr. *Pleas*, &c. I. 3; Cro. Eliz. 691.

(v) 2 Saund. 409, 410.

(w) Bac. Abr. *Pleas*, &c. I. 3. and see 1 Saund. 117. (n. 1.)

and praying judgment of *the action*.(x) The rejoinder, and subsequent special pleading on the part of the defendant, begin and conclude in a similar manner.

A special replication begins with *precludi non*, i. e. that the plaintiff ought not to be barred, &c.; and concludes with a verification, and a prayer of judgment, and his debt, damages, &c. to be adjudged to him.(y) The surrejoinder, and the special pleading which follows it, on the part of the plaintiff, begin and conclude in a similar manner.

(x) 2 Chitt. Pl. 421-2; *Shirby v. Shattuck*, 13 Met. (Mass.) 256.

(y) 2 Chitt. Pl. 593-4, 615, 616.

Further of ANSWER under the Codes, see Clark's Code of Civil Procedure, Annotated, (N. C.), 3rd ed., § 243 *et seq.*

CHAPTER IV .

OF TRAVERSE.

A *traverse*, in pleading, is a *denial*, on one side, of some matter of fact before alleged, on the other; and (regularly) tenders an issue in fact. (a)

A traverse may be taken to any part of the pleadings—as to the declaration, the plea, the replication, &c. (b): though when the whole substance of the *declaration* is to be denied, the proper form of denial is the *general issue*; which is a compendious traverse of the whole complaint.

A traverse, concluding to *the country*, forms an issue in fact; so that nothing more is necessary, to prepare the matter in controversy for trial, than the addition of the *similiter*—by the addition of which the issue is *joined*. But a traverse, concluding with a *verification*, only *tenders* an issue, which remains to be formed by the adverse party's *reaffirming* the allegation traversed, and concluding to the country. (c)

A *technical* traverse, is one which is preceded by *introductory affirmative* matter, called the *inducement* to the traverse (d); and may be *general* or *special*.

A *general* traverse, of the technical kind, is one preceded by a *general* inducement, and denying, in *general* terms, *all* that is last before alleged on the opposite side—instead of pursuing *the words* of the allegations, which it denies. Of

(a) Bac. Abr. *Pleas*, &c. H. 1; Co. Litt. 282.

(b) Doct. Pl. 344; Bac. Abr. *Pleas*, &c. H. 1.

(c) Bac. Abr. *Pleas*, &c. H. 1.

(d) *Ib.*

this sort of traverse, the replication *de injuriâ sua propria, absque tali causâ*, in answer to a justification, is a familiar example. (e)

A technical traverse, when *special*, begins in most cases, with the words '*absque hoc,*' (*without this*); which words, in pleading, constitute a technical form of negation. (f) A traverse, commencing with these words, is called *special*; because, when it thus commences, the inducement and the negation are, regularly, both *special*—the former consisting of new special matter, and the latter pursuing, in general, the words of the allegation traversed, or at least, those of them which are material.

Thus, if to debt on bond the defendant pleads, that he executed the bond by duress; and the plaintiff replies, that the defendant executed it of his own free will, and for valuable consideration, *without this*, that he executed it by duress; the traverse is *special*. So also, if the defendant pleads title to land, in himself, by alleging that J. S. died seised in fee, and devised the land to him; and the plaintiff replies, that J. S. died seised in fee, *intestate*, and alleges title in himself, as heir to J. S. '*without this,*' that J. S. devised the land to the defendant; the traverse is *special*. (g) Here the allegation of J. S.'s intestacy, &c. forms a *special* inducement; and the *absque hoc*, with what follows it, is a *special* denial of the alleged devise, i. e. a denial of it, in *the words* of the allegation.

In some cases, however, other words of equivalent import—as the words *et non*—are used instead of the words *absque hoc*. Thus, if the defendant pleads that J. S. was arrested, by virtue of a warrant returnable on the *first* day of such a certain month; the plaintiff may reply, that J. S. was arrested upon a warrant returnable on the *second* day of the same

(e) *Ib.*

(f) *Ib.* Lawes' Pl. 116 to 120.

(g) Lawes' Pl. 119, 120.

month, 'and not' by virtue of the warrant returnable on the first day of the month specified in the plea. (h)

The traverse *de injuria*, &c. *absque tali causâ*, (that the defendant, 'of his own wrong, and without the cause in his plea alleged, did commit the said trespasses,' &c.), though of frequent occurrence, is confined to actions *ex delicto*, and used only in *replications*. This does not, like a special traverse, follow the *words* of the allegations traversed; but denies the *whole* matter of the plea, by a general and comprehensive *formula*, devised for the purpose of abridging the replication.

Thus, if to an action of assault and battery, the defendant pleads *son assault demesne*, (that the plaintiff made the first assault, &c.); the plaintiff, instead of traversing *specially* all the material allegations in the plea, may deny the whole, by replying that the defendant 'of his own wrong, and without the cause in his said plea alleged,' committed the several trespasses, &c. and conclude to the country. (i) In this traverse, not only the form of denial, but the inducement also, varies essentially from that of a *special* traverse: since the inducement *de injuriâ*, &c. alleges no *new* matter; but simply *re-affirms*, in general terms, the wrongs complained of in the declaration, and the traverse *absque tali causa*, in an abridged denial of the special justification.

The late precedents have introduced, in certain cases, (as in replications to pleas of *usury*, or other *illegality*), a new species of general or abridged traverse, preceded by a *general* inducement, which denies the plea, in *general* terms, according to an established form, instead of traversing it *specially*, by following the precise terms of it, as was formerly done. This traverse concludes to the country. (j)

(h) 1 Saund. 20, 21; Lawes' Pl. 119, 120.

(i) 2 Chitt. Pl. 523, 641-2; Cro. Car. 164; Bac. Abr. *Pleas*, &c. H. 1.

(j) 2 T. R. 439; 3 Ib. 426; 1 Saund. 103, b. (n. 3.)

The usual form of this traverse is as follows, viz. that 'the said bond, promise, &c. was made, for a good and lawful consideration and not in pursuance of, or upon, the said corrupt and unlawful

There is also a species of traverse, differing from all those called *technical*, not only in form and phraseology, but also in this—that it is preceded by no inducement, special or general. This traverse is taken without an *absque hoc*, or any similar words, and is simply a direct denial of the adverse allegation, in *common* negative language, (for which reason, perhaps, it is usually called a *common* traverse), and always concludes to *the country*. And because it has no inducement, it is also sometimes called ‘an issue,’ as distinguished from a ‘traverse,’ technically so called. (*k*) Thus if one party pleads title to land in himself, under a devise from J. S., alleging that J. S. died seised in *fee*, and devised the land to him; the other party may traverse the seisin in fee of J. S. either by averring that J. S. ‘died seised in *tail* (or *for life*) *absque hoc*, that he died seised in fee;’ and concluding with an averment—or, by a direct negative, alleging, (without an inducement), that J. S. ‘did *not* die seised in fee,’ &c. and concluding to *the country*.

But a *common* traverse is not adapted to all cases, in which the allegations of a party are to be denied. For it is, many times, necessary, as will hereafter appear, that the denial of an adverse allegation be preceded by affirmative matter, by way of *inducement*; and when this is necessary, a *common* traverse, (which has no inducement), can never be proper. It can properly be used, only where *no inducement* is necessary (*l*); that is, where the party traversing has no occasion to allege any *new* matter.

But whenever a *common* traverse is proper, it is generally the more eligible mode of traversing—not only because it is a more simple and direct form of negation; but also because

agreement, or for the purpose, in the said plea of the said C. D. mentioned, in manner and form, &c. and this the said A. B. prays may be inquired of by the country.’ *Vide* 2 T. R. 439; 3 Ib. 426; 2 Chitt. Pl. 616.

(*k*) Lawes’ Pl. 117; 1 Saund. 103, b. (n. 1.); 2 Stra. 871.

(*l*) 1 Saund. 103, b. (n. 1.)

it produces an issue *sooner*, by one stage in the pleadings, than a traverse with an *absque hoc* usually does. For a common traverse always concludes to *the country*: whereas, a traverse with an *absque hoc* concludes, in most cases, with an *averment*; and the issue is then formed by the opposite party's reaffirming, in *the next succeeding stage* of the pleadings, what the traverse has denied. (m)

Thus, if to a plea of title, stating that J. S. died seised in fee, and devised the land to the defendant, the plaintiff denies the seisin in fee of J. S. by a *common* traverse, viz. that he *did not* die seised in fee, &c. concluding to the country; the issue is formed by the *replication*. But if the plaintiff traverses *specially*, by replying that J. S. died seised in tail, *absque hoc* that he died seised in fee, concluding with an *averment*; the issue is not formed, till the defendant re-affirms, in the *rejoinder*, that J. S. died seised in fee, as alleged in the plea, and concludes to the country. (n)

Whenever a special traverse, and its inducement, are properly adapted to each other, and both go to the '*same point*'—that is the same matter of fact (as in all the preceding examples they do)—the traverse is only *an inference from*, or a *consequence of*, the inducement; so that, if the one be true, the other is necessarily so. (o) It results, therefore, that in all such cases the inducement itself necessarily *contradicts* the allegation traversed. But though the inducement is repugnant to the allegation to be denied; the super-addition of a formal traverse is nevertheless indispensable: because the

(m) 1 Saund. 103, b. (n. 1.); Bac. Abr. *Pleas*, &c. H. 1.

(n) The *common* traverse is, substantially, the one generally in use, under the New York Code;—this is where the defendant does not deny the complaint *generally*, or set up new matter;)—and that, without any re-affirmance or any technical conclusion, *completes* such issue as we now have.

(o) Examples of an inducement, and a traverse, going to *different points*, will be given hereafter. (*Vide* 'traverse after a traverse; post.)

adverse allegation, and the inducement to the traverse, being both in the *affirmative*, do not constitute *an issue*. The truth of these remarks, will be apparent, from the mere recurrence to the several examples, already given, of *special* traverses. One of these examples, however, may suffice; as the explanation to be given of it will apply equally to all the others: In the instance before mentioned, of an allegation in the plea, that 'J. S. died seised in fee,' and a replication, that he 'died seised in tail, ' *without this*, that he 'died seised in fee,' it is observable, in the first place, that the inducement and the traverse both go to the *same point*, i. e., to the single question, whether he died seised of a fee-simple, or not. It is very obvious also, that the traverse is a *mere inference* from the inducement; and that if the latter be true, the former must be so: and finally, that the inducement is as utterly *repugnant* to the allegation in the plea, (though not so in *direct* terms), as is the traverse itself. In brief, the replication is merely tantamount to saying that 'J. S. died seised in tail, and *therefore* did not die seised in fee.' None of these observations, however, are applicable to cases, in which the inducement and th traverse go to *different* points.

As to the manner of concluding traverses, there is some discrepancy in the precedents; but the following appear to be the true distinctions:

a. A *common* traverse always concludes to the *country*. (p) For as it is preceded by no *inducement*, there can be no possible use in keeping the pleadings longer open: since the traverse, being connected with no *new* matter of any kind, leaves nothing to be *answered* by the adverse party. If, however, the traverse be immaterial, or otherwise ill taken; it may, like any other traverse thus faulty, be demurred to.

b. A *general* technical traverse, having a *general* inducement, (as in the instance of the replication *de injuria* &c.

(p) 1 Saund. 103, b. (n. 1.); Bac. Abr. *Pleas*, &c. H. 1; 2 Stra. 871; 7 Johns. 283.

absque tali causa), concludes in the same manner. (q) For in this case, the inducement, (which is but a re-affirmance, in general terms, of what has been before alleged in the declaration), contains, properly speaking, no *new* matter; and consequently, neither requires nor admits of any kind of *answer*. And it may be added, that as every such traverse denies *the whole* of what is last alleged in the adverse pleading; it cannot be *immaterial*, and consequently must be *accepted* by the opposite party, unless it be faulty in form—and if so, it may be demurred to. It is obvious, therefore, that in this case, as in the last, there can be no possible reason for keeping the pleadings any longer open to an answer.

c. When a traverse is taken with an *absque hoc*, and is preceded by a special inducement, containing new matter, it was formerly held by some, that the conclusion must, in *all* cases, be with an averment (r)—in order to afford the adverse party an opportunity, to answer, (at his own peril, indeed), the *new* matter contained in the inducement.

d. But the modern authorities, more studious of brevity in pleading, than the ancient, have qualified this last rule; and it appears now to be established, as a general rule, that where a traverse, even with an *absque hoc*, and preceded by a special inducement, denies the *whole substance* of what is alleged on the other side, it must conclude to *the country* (s) though, where it denies only a *part* of the matter, alleged by the adverse party, it must still, generally, conclude with an averment. (t)

The reason of this distinction appears to be, on the one hand, that in the former case, the party, whose pleading is traversed, cannot object to the traverse as being *immaterial*,

(q) 2 Chitt. Pl. 523, 641, 642; Bac. Abr. *Pleas*, &c. H. 1; 1 Saund. 103, b. (n. 1.); 2 Black. R. 1165; 1 Bos. & P. 76.

(r) Co. Litt. 126, a; 1 Saund. 103, a. (n. 1.); 2 Stra. 371.

(s) 1 Salk. 4; 7 Mod. 105; Doug. 94. 428; 2 T. R. 441, 443; 2 Stra. 371; 1 Saund. 103. a. b. (n. 1.); Sayer, 234; 2 Johns. R. 428.

(t) Id.

or as not comprehending the whole matter in controversy; since, by the supposition, it embraces *all* the substantive matter alleged on his own part. No reason therefore can exist, (so far as regards the *substance* of the traverse), why he should refuse to join in it, and be permitted to answer over. But when, on the other hand, a special traverse embraces only *part* of the substance of the adverse pleading, the reason for concluding it with an averment is, that such a traverse *may be immaterial*; and that if it be so, it *may* be proper for him to whom it is tendered to answer *the inducement*. For which latter reason, a traverse, denying only a *part* of what is alleged on the other side, must (regularly) leave the pleadings open—in order to give the adverse party an opportunity to plead to the inducement, if he should judge it safe and proper so to plead.

This view of the subject may be illustrated by the following example: In an action of waste, the declaration alleges that the defendant, (the lessee), felled, *and sold* the plaintiff's trees; and the defendant, confessing that he felled them, pleads by way of justification, that he bestowed them in repairs, *absque hoc* that he sold them—thus traversing only a part, and an *immaterial* part, of the declaration. And as this traverse is clearly immaterial; the plaintiff is not bound to join in it, but has a right to reply that the defendant left the trees to decay, &c. *absque hoc* that he bestowed them in repairs—thus traversing *the inducement* to the defendant's traverse. (u) But this the plaintiff could have no opportunity to do, if the defendant's traverse concluded to *the country*: and therefore, according to the general distinction above stated, the defendant's traverse ought to conclude with an *averment*. Such seems to be the principle or *reason* of the rule, that a special traverse with an *absque hoc*, embracing only *part* of what is alleged on the other side, must, in general, conclude with an averment.

(u) Hob. 104.

But the rule, that a special traverse of only a part of what is alleged on the other side, must conclude with an averment, is by no means universal. For it seems now agreed, that 'in many cases' falling within the terms of the rule, the conclusion may be *either way*.^(v) In *what* particular cases, however, such a traverse may conclude in '*either way*,' the books do not precisely show.^(w) In the case of *Baynham v. Mathews* ^(x) which was an action on a promissory note, the defendant pleaded usury, and the plaintiff replied that the note was given for a just debt, *absque hoc*, that it was corruptly agreed, &c. concluding to *the country*. And there being *two* material facts alleged in the plea, (*viz.* first an usurious agreement; and second, that the note was given in consideration of that agreement), and *one* of them only being traversed; the court held, on special demurrer, that the traverse should have concluded with an *averment*. But in the subsequent case of *Hedges v. Sandon* ^(y) *Buller* and *Grose*, JJ., in commenting on the case of *Baynham v. Mathews*, both expressed a decided opinion, that the traverse, in that case, might properly have concluded *either way*.

It seems now, therefore, that although a plea of usury, to an action on a written security; regularly alleges *two* material facts, as above stated; yet *a special* traverse, denying the corrupt agreement only, *may* conclude to the country: since the negation of that fact is a decisive answer in law to the whole defence. Such a conclusion, however, in such a case, is con-

(v) 1 Saund. 103. a. b; 2 T. R. 439, 443; 2 Wils. 113; Lawes' Pl. 121; 1 Chitt. Pl. 615. 616.

It can be only by the sanction of *precedent*, (founded originally upon some mistake), that the pleader is allowed, in any instance whatever, to conclude a traverse *either way*, at his own election. On principle, the admission that *one* of the two modes of concluding any given traverse is proper, would seem to imply that the other is, by necessary consequence, improper.

(w) 2 Stra. 871; 1 Burr. 317.

(x) 2 Stra. 871.

(y) 2 T. R. 439, 443-4.

fessedly opposed to the rule which originally prevailed; and there is no doubt, that such a traverse *may still* conclude with an *averment*. And even in the more modern precedents, the latter, it seems, is the more usual mode of concluding such traverses. (z) It may be added, that in cases where a doubt still exists as to the proper manner of concluding such a traverse, this latter form is probably the safer; since, by all the opinions, it is a proper form—though, as some hold, not the only proper one.

But where one of several facts, alleged by either party, constitutes the *whole substance* of his pleading—all the others being *immaterial*—the rule appears to be, clearly, that a special traverse of that fact alone may conclude to the *country*; and the Court of King's Bench (a) have held, that it *must* so conclude. The case, here referred to, was debt on bond: plea, that the defendant executed the bond through force and restraint of imprisonment: replication that the defendant executed it of his own free will, *absque hoc*, that he executed it through force, &c. without answering the *imprisonment*, and concluding with an *averment*. On special demurrer, showing for cause, that the conclusion was ill, the court held that it was so; and that the conclusion should have been to *the country*; because the imprisonment being immaterial—the duress was the *whole substance* of the plea.

Whether, by the common law, the wrong conclusion of a traverse is a fault in *substance*, or in *form* only, the opinions are not all agreed. According to most of the authorities, it is matter of *substance*, and fatal on *general* demurrer. (b) As, however, the conclusion of a traverse neither affirms nor denies any *fact* in controversy, and shows nothing material to the cause, on either side—but is simply a *technical form* of

(z) 1 Saund. 103. b. (n. 1.); 1 Chitt. Pl. 616.

(a) Sayer, 234—and (with some *circumstantial* differences) in Williams's note, 1 Saund. 103. a.

(b) 1 Vent. 240; T. Ray. 94; 1 Saund. 103. b. (n. 1.); 3 Mod. 203; Cro. Car. 164.

closing the pleadings, or keeping them open; this rule may, perhaps, on original principles, be questionable.(c)

The general replication, *de injuria, &c. absque tali causâ*, is adapted to the denial of matter of *excuse* or *justification*; and where the excuse or justification consists exclusively, of mere matter of *fact*, as distinguished from matter of *record*, *title*, *authority*, &c. this replication is the most appropriate mode of traversing it.(d)

But as this replication always denies the *whole* of the plea, to which it is an answer (e) it follows, that when the plea contains, among other things, matter of *record*, *right*, *title*, or *authority* (all of which involve matter of *law*), the general traverse *absque tali causa*, is improper.(f) For this general traverse, which must conclude to *the country* (g), is not only *inapposite* to the denial of such matters of law, but would refer to the jury matter both of *law and fact*, blended in one issue, instead of separating the one from the other, as the principles of pleading require. And it would moreover, for the last reason, be faulty, as being *double*.(h)

It results, then, that to the plea of *son assault demesne*, the traverse, *absque tali causa*, is a good answer: since the plea consist of matter of *mere fact*.(i) And the same rule ap-

(c) As, under the Code, our pleadings, (unless on a mere denial,) *do not close*; there is here no need of *any conclusion* to any thing. Accordingly we have none,—except the prayer for judgment; which, by the plaintiff, is for his damages, or property, or specific relief; and, by the defendant, is for his costs, or (as the case may be,) affirmative relief.

(d) Lawes' Pl. 151-156; 8 Co. 67; Com. Dig. *Pleader*, F. 20. 21; Yelv. 158. n.

(e) 2 Saund. 295. (n. 1.); 8 Co. 67, a.

(f) Id.; 1 Chitt. Pl. 578-9, 581-3; 8 Co. 67-8; Com. Dig. *Pleader*, F. 20, 21, 22; 1 Bos. & P. 79, 80; Willes, 103. n. a; 5 Johns. 112.

(g) Cro. Car. 164.

(h) 8 Co. 67. b; Bull. N. P. 93.

(i) 2 Chitt. Pl. 642; Com. Dig. *Pleader*, F. 18; 3 M. 15; Lawes' Pl. 155.

plies to all justifications, consisting *exclusively* of such matter.

But when the justification involves matter of *law*, (as where in an action for assault, battery and false imprisonment, the defendant justifies, under a *capias* directed to the sheriff, and a *warrant* from the sheriff to himself), this general traverse of the justification would be ill, as including matter of *record and authority*, viz. the *capias* and the *warrant*.(j) But the plaintiff, in a case like this, may traverse, *separately*, any one material point in the plea; which point may consist either of the record or authority—or of the matter of *mere fact*, pleaded in connection with it. He may, for example, traverse the *warrant*, by replying that the defendant, *de injuriâ &c. absque tali warranto*, made the said assault, &c.—or he may traverse the *capias*, by replying *nul tiel record*: or on the other hand, he may admit the *capias* and *warrant*, and traverse the matter of *mere fact* alleged in the plea, by alleging that the defendant ‘of his own wrong, and without *the residue* of the cause, in the said plea alleged,’ made the said assault, &c.(k)

But when matter of record, title, &c. is alleged, not as *the ground* of the justification, but only as inducement, the general replication, *de injuria &c. absque tali causâ*, is good. If therefore, in assault and battery, the defendant alleges that he was seised of an estate in a certain close—that he had cut the corn, growing upon it—that the plaintiff came to take away the corn, and the defendant, in defence of his corn, did the acts complained of; the plaintiff may traverse the plea, in the above general form.(l) For in this case, the justification is not founded upon the defendant’s *title*; but upon the alleged *aggression* of the plaintiff. The title pleaded is,

(j) 8 Co. 67. a; 2 Saund. 295. (n. 1.); 1 Bos. & P. 77; Com. Dig. Pleader, F. 20; 12 Mod. 580; Lawes’ Pl. 154; 1 Chitt. Pl. 582.

(k) Id.; 3 Lev. 243; 2 Chitt. Pl. 644-5.

(l) Yelv. 157; Lawes’ Pl. 156; 2 Saund. 295. b. (n. 1.); Cro. Jac. 224; Latch, 221.

therefore, but *inducement*, and being immaterial, the defendant is not bound to prove it strictly: proof of his mere *possession* being, on this point, sufficient.

We have before seen, that one principal object of the science of pleading is to bring the parties to an *issue*, of some kind, as soon as the state of the facts alleged in each case, will permit. When therefore an allegation, on one side, is directly denied on the other, by a *common* negative, the *super-addition* of a technical traverse is unnecessary and improper, and therefore a good cause of demurrer.(*m*) Thus, if to a plea of usury, the plaintiff replies that it was *not* corruptly agreed, &c. as the defendant has alleged, *absque hoc* that it *was* corruptly agreed, &c.; the replication is ill. For the first negative forms a complete issue upon the plea, and should therefore conclude to the country. The *absque hoc* is unnecessary, and would *postpone* the issue, until the rejoinder is given.

It is also a general rule, that when either party alleges new matter, *inconsistent* with a preceding traversable allegation of the adverse party, but which does not form an *issue* upon it, the new matter must conclude with a *traverse*.(*n*) For in such a case, it is apparent, from the inconsistency of the adverse allegations, that the controversy is ripe for an issue. If therefore the last pleader were allowed to conclude without a traverse, the other party might, with equal propriety, do the same; and the issue might thus be postponed indefinitely. If therefore a defendant pleads that his co-defendant is *dead*; and the plaintiff replies that he is *alive*; the replication must add '*absque hoc*, that he is dead.' For the two *affirmative* allegations, though repugnant to each other, do not form an issue. Thus also, if the defendant pleads that

(*m*) Yelv. 38; Cro. Eliz. 755; Bac. Abr. *Pleas*, &c. H. 1; 2 Saund. 188.

(*n*) Hob. 103; 1 Saund. 22 & n. 2. 207, (n. 4.) 209, (n. 8.); Com. Dig. *Pleader*, G. 2; 1 Wils. 253; Lawes' Pl. 117-18, 150; 3 Black. Com. 310; Bac. Abr. *Pleas*, &c. H. 1.

the bond, on which, &c. was given by duress; and the replication alleges that he executed it of his *free will*; there must be superadded a *formal traverse* of the duress, by an *absque hoc*, or *et non.*(o)

But to the above general rule, there is an exception, whenever, in answer to a *negative* plea, it is necessary for the plaintiff to set out new affirmative matter *specially*, in order to make out his case in full, upon the face of the pleadings. In such a case, the plaintiff cannot conclude with a traverse of the plea; although his new matter is absolutely inconsistent with it. For if he should thus conclude, the real ground of his demand could not appear from the pleadings.(p) Thus, in debt on an arbitration-bond, if the defendant pleads, '*no award*,' and the plaintiff replies that the arbitrators '*did make their award*;' he cannot conclude this allegation with a traverse, tendering an issue on the plea—though the allegation is directly repugnant to it; but must proceed to set out the award, and assign a breach—concluding with an averment. For in a case like this (the declaration being *general*) the true cause of action never appears, until the *replication* discloses it. If therefore the plaintiff should conclude the general averment of an award made, with a traverse or tender of issue; the real cause of action, (which is some breach of the award), could never appear from the pleadings. To a plea of *non damnificatus* also, it is, for the same reason not sufficient for the plaintiff to reply, that he '*has been damnified*.' The replication must show *what particular damage* has accrued (q), and conclude with an averment.

But when a party merely *confesses and avoids* his adver-

(o) The omission of a traverse, when necessary, has been held to be matter of *substance*, at common law. (2 Mod. 60; Bac. Abr. *Pleas*, &c. H. 2.) *Sed quare*. (Vld. 1 Leon. 43-4.) But under the statute 4 & 5 Ann. c. 16, it is but matter of *form*.

(p) Hob. 233; 1 Salk. 138; Lawes' Pl. 150; 6 East, 556-7; Carth. 116; 1 Saund. 103. (n. 1.); 2 Bos. & P. 362.

(q) Bac. Abr. *Pleas*, &c. L.; 2 Saund. 80; 1 Sid. 444.

sary's allegations, by new matter of his own, a traverse of those allegations would be improper and absurd; since it would be repugnant to the pleader's own confession. (r) For example, the defendant pleads *a release*; and the plaintiff replies, that it was given by *duress*: here a traverse of the release itself would be preposterous—as it would contradict the plaintiff's allegation of duress, which *admits* the release. Thus also, if the defendant pleads *infancy*, and the plaintiff replies *necessaries*, or a *promise after full age*; a traverse of the allegation of infancy would, for the same reason, be ill. In cases like these, the matter of avoidance should conclude with a verification, and without a traverse. (s)

It is said, in several books (t), principally, it would seem, on the authority of a remark of *Lord Hobart* (u) that a special traverse, without a proper inducement, will be a *negative pregnant*. But the proposition, thus unqualified, appears to be much too general, and is likely to occasion misapprehension. Undoubtedly a *special* traverse must have an inducement, (and of course, a proper one;) for an inducement enters into the definition of such a traverse; and a traverse, without an inducement, cannot be a *special* one. But that a traverse, in any form, having no inducement, is *therefore a negative pregnant*, is by no means universally, or perhaps, generally true. It is indeed certain that in various instances, (as in that to which *Lord Hobart's* remark, in the above reference, applied), a traverse, without an inducement, would be a negative pregnant, when, with a proper inducement, limiting its extent and

(r) Com. Dig. *Pleader*, G. 3; Bac. Abr. *Pleas*, &c. H. 1; 1 Brownl. 148, 197; Sav. 2; Winch, 38; Cro. Car. 384; Yelv. 151; 1 Saund. 22, (n. 2.) 209, (n. 8.); 13 Mass. R. 520.

(s) Id; 1 Wils. 253; 3 Black. Com. 309.

(t) Com. Dig. *Pleader*, G. 20; Lawes' Pl. 118.

(u) Hob. 321. *Lord Hobart*, however, lays down no such *general* rule. His remark is confined to the particular traverse, then in question, and which was a negative pregnant, from the want of a proper inducement.

application, it would not be so: but it is equally certain, that in many, perhaps in most cases, the absence of an inducement does not at all affect the sufficiency of the traverse; and that an inducement is often used in pleading, when wholly unnecessary.

These remarks may be illustrated by the following examples:—If in assault and battery, the defendant pleads *molliter manus imposuit*, in virtue of a lawful authority to arrest the plaintiff, and the plaintiff replies, *non molliter manus imposuit*, without an inducement; the replication is a *negative pregnant*. For it is consistent with the supposition, and therefore admits, by implication, that the defendant *did not* lay his hands upon the plaintiff at all. The plaintiff should therefore reply *an outrageous (or excessive) battery, absque hoc, molliter manus, &c.*(v)

Again, if in an action of assault and battery brought by a child or servant, the defendant pleads *moderatè castigavit*, in virtue of his authority as parent or master; and the plaintiff replies, *non moderatè castigavit*; the replication is a *negative pregnant*. For it is open to the implication that the defendant *did not* chastise him at all.(w) The replication should, therefore, begin with an inducement, like that in the last example, and conclude with an *absque hoc*, that the defendant moderately chastised the plaintiff. For in both these cases, as in all others of the same kind, the inducement, taken in connection with the traverse, so explains and limits its extent and meaning, as to exclude the objectionable implication or admission. There are numerous other instances, in which a proper inducement to a traverse is necessary, for the purpose of excluding a *negative pregnant*.(x)

But, as has been already observed, there are also very many cases, in which a traverse needs no inducement, for this, or any

(v) Com. Dig. *Pleader*, 3 M. 16; Skin. 387.

(w) 2 Keb. 623; 1 Vent. 70.

(x) Bac. Abr. *Pleas*, &c. I. 6; Com. Dig. *Pleader*, R. 5.

other purpose.(y) Such is always the case where a *common* traverse is a proper form of denial; and this form is often proper, in cases, in which the precedents usually employ an inducement. Thus, if a defendant pleads that his co-defendant is dead; there can be no doubt that the plaintiff may safely reply, he is *not* dead—instead of alleging that he is alive, *absque hoc*, that he is dead. For it is clear that the traverse, in the form first stated, contains no implication, which can render it a *negative pregnant*. To a plea of usury, also, alleging a corrupt agreement, in the usual form, a replication that it *was not* corruptly agreed, &c. (instead of the usual inducement of a 'good and lawful consideration' with an *absque hoc*, &c.) is doubtless good, and for the same reason.(z)

But without accumulating examples of the same kind, it may suffice to add, that whenever a traverse is to be tendered, the pleader has only to determine for himself, whether, without an inducement, it would be a *negative pregnant* or not, (a point easily decided in most cases); and then to traverse, with or without it, as his judgment may direct.

Whenever a traverse, or negative allegation of any kind, involves an affirmative implication, which *does not maintain the pleading of the adverse party*, the implication does not injure the traverse.(a) Thus, if a plea of usury alleges a corrupt agreement for the payment of *ten* per cent for forbearance; and the plaintiff replies, by a common traverse, that it *was not* corruptly agreed that he should pay *ten* per cent; the traverse, it is conceived, is clearly good—though it impliedly admits a reservation of *nine*, or any other per cent., not amounting to *ten*. For the admission, *does not maintain the plea* which must be proved *precisely*, to defeat the action. And it is very obvious, that no implication, on one side, which

(y) 1 Saund. 103, b. (n. 1.)

(x) 2 Stra. 871; 1 Saund. 103, b. (n. 1.)

(a) Com. Dig. *Pleader*, R. 6; Lawes' Pl. 114.

does not *aid* the other, can injure any traverse, or other pleading. (b)

‘An issue, joined upon an *absque hoc*, &c. ought to have an *affirmative* after it’. (c) In other words, no other than an *affirmative* allegation can be properly traversed with an *absque hoc*. For if a *negative* be thus denied, the traverse will consist of *two negatives*; and though these amount, in *English*, to an affirmative; yet such a mode of expressing an affirmative tends to confusion and perplexity, and is therefore, in point of form, not allowable in pleading. For example: If the defendant pleads that the plaintiff did not deliver such a certain writing; a replication, ‘*absque hoc* that he did not deliver,’ &c. is the same thing, in effect, as saying ‘he did *not not* deliver.’ A *negative* allegation, then, can be properly traversed, only by an *affirmative*. (d)

It is a general rule, that a traverse, well tendered on one side, must be *accepted* on the other. (e) And hence it follows,

(b) Under the Code,—though it has been held that a defendant, answering *usury*, must prove *the* corrupt agreement he alleges, and not a *different* one;—it is doubtful whether that be the rule, unless the *plaintiff has been misled* by the answer. And the rule will, probably, be settled to be, that unless the agreement proved vary in its *entire scope* from the one alleged,—so as to make a *failure of proof*,—it will not be held a *variance*. 10 How. Pr. Rep. 315. 1 Kern. 368; 10 Barb. 321; 12 Ib. 601; 1 Duer, 253; 5 Ib. 379. There is some hope however that a truer rule of pleading will prevail; that the defendant in his answer must give the terms of the usurious agreement; *and prove it as alleged*. 31 Barb. 100.—In such a rule there is no hardship: for the party must know what agreement he made, and he should state the fact as it was. *He* is not liable to either mistake, or surprise.

(c) Co. Litt. 126. a; Bac. Abr. *Pleas*, &c. H. 1; 1 Chitt. Pl. 587.

(d) It may be added, that when negative matter is to be contradicted by an affirmative, the latter generally advances such *new* matter, as must be left open, to be answered by the adverse party, (2 Lev. 5; 1 Vent. 121; 2 Burr. 772)—in which case, the following up of the new matter with a traverse, would be manifestly inadmissible.

(e) Gilb. H. C. P. 66; Hob. 104; Bac. Abr. *Pleas*, &c. H. 4.

as a general rule, that there cannot be a *traverse upon a traverse*, if the first traverse is *material*. (f) The meaning of this rule is, that when one party has tendered a *material* traverse, the other cannot leave it, and tender another traverse of his own, to *the same point*, upon the inducement to the first traverse, but must *join* in that first tendered: otherwise the parties might alternately tender traverses to each other, in unlimited succession, without coming to an issue. For example: The defendant pleads title, under a devise from J. S. alleging that he died seised *in fee*: The plaintiff replies, that 'J. S. died seised *in tail, absque hoc*, that he died seised *in fee*,' with a verification: The defendant cannot now rejoin that J. S. died seised *in fee, absque hoc* that he died seised *in tail*; but must join in the plaintiff's traverse, by re-affirming that J. S. died seised *in fee*, as alleged in the plea, and conclude to the *country*. For both traverses would go to the *same point*, viz. whether or not J. S. died seised *in fee*—the only material point in controversy, and to the determination of which the first traverse is precisely adapted. If the defendant then, might traverse the plaintiff's *inducement*, (the alleged seisin *in tail*); the plaintiff might, on the same principle, traverse that of the defendant, as at first, with a *verification*; and if this might be once done by either party, it might be repeated on both sides, to any indefinite extent, without producing an issue.

But the above general rule does not extend to cases, in which the traverse first tendered is *immaterial*. In such a case, there may be a *traverse upon a traverse*—i. e. the traverse first tendered may be passed over, and the *inducement* to it if material, may be traversed; although both traverses go to

(f) Hob. 104; Bac. Abr. *Pleas*, &c. H. 4; 1 H. Black. 403; 1 Anst. 231; 1 Saund. 22, (n. 2.); Co. Litt. 282; 1 Salk. 222; 1 Ld. Ray. 121; Com. Dig. *Pleader*, G. 17; Vaugh. 62.

A traverse *upon a traverse* is one going to the *same point* (of subject-matter) as is embraced in a preceding traverse, on the other side.

the same point.(g) Thus, in an action of waste for felling timber-trees, the plaintiff declares, that the defendant, (the lessee), felled and *sold* them: the defendant confessing that he felled them, justifies that act, by pleading that he bestowed them in *repairing* the demised buildings, *absque hoc*, that he *sold* them. Now the plaintiff may refuse to join in the traverse tendered upon the *sale* of the trees—because that point is *immaterial*; and may himself traverse the *inducement* to the defendant's traverse, viz. the alleged *repairing*; for this is the only material point in the plea. Both the traverses here go to the *same point*, viz. the use or disposition made of the trees, when felled; upon which point the justification depends. Instead of answering the plea at all, however, the plaintiff might specially *demur* to it, for the *immateriality* of the defendant's traverse.(h)

And there is one class of cases, in which there may be a traverse *upon* a traverse, although the first traverse includes what is *material*. The cases, here referred to, are those in which *false* pleading, on the part of the defendant, might otherwise oust the plaintiff of *some right or liberty*, which the law allows him.(i) For example: To an action of assault and battery and false imprisonment, laid in the county of A., the defendant pleads a local justification, in the county of B., viz. that he was sheriff of the latter county, and arrested the plaintiff *there*, under a *capias*, (or other lawful authority), *absque hoc*, that he is guilty in the county of A., &c. Now as the defendant's alleged authority, which is the inducement to the traverse, may be *false*; the plaintiff, instead of joining in the traverse, may traverse that *authority*. For, assuming

(g) Hob. 104, and Williams' note (1); Co. Litt. 282 b; 1 Saund. 20, 22, (n. 2.); 1 Ld. Ray. 125; Bac. Abr. *Pleas*, &c. H. 4; 1 H. Black. 376, 406; Com. Dig. *Pleader*, G. 19; Vaugh. 62; 1 Anst. 231.

(h) Hob. 104; Cro. Jac. 221; 1 Saund. 21, (n. 1.), 22, (n. 2.); Yelv. 151.

(i) Poph. 101; Mo. 350; Com. Dig. *Pleader*, G. 18; Bac. Abr. *Pleas*, &c. H. 4; Hob. 104, *marg*; Cro. Eliz. 99, 418.

that the alleged trespass was actually committed in the county of *B.*—still, (the action being transitory), the plaintiff has by law a right to sue and recover for it, in any other county. But if he were obliged to join in the defendant's traverse, by re-affirming that the defendant committed the trespasses in the county of *A.*; the plaintiff would necessarily fail on that issue—although he has, by the supposition, a right by law to recover in *that* county. And thus the plaintiff would, by the *falsity* of the defendant's justification, be deprived of the liberty, which the law allows him, of laying his action in what county he pleases, in a transitory action. On the other hand, if the defendant's justification be *true*; the traverse taken upon it can subject him to no disadvantage: since by proving it true, he must prevail, upon the issue. The object of the rule, in cases like the above, is to prevent the defendant, in a transitory action, from *ousting the plaintiff's venue, by false pleading*.

A traverse *after* a traverse—i. e. one going to a *different* point or subject-matter, from that embraced in a preceding traverse, on the opposite side—is allowed, even though that first tendered be *material*. (*j*) Thus if in trespass, defendant pleads a justification on a particular day, with a traverse that he is guilty on any other day; the plaintiff, instead of joining in the traverse, alleging a trespass within the time embraced in it—may pass by the defendant's traverse, and traverse the matter of *justification*; in which case, the traverse in the replication will be a traverse *after* a traverse; since it does not embrace the *same point*, as is embraced in the first traverse. For the plaintiff's traverse applies only to the trespass *justified*, which is a supposed trespass, on the particular day laid in the justification: whereas the traverse in the plea extends only to a trespass on any *different* day. The reason, for allowing the plaintiff to traverse, in this manner,

(*j*) Hob. 104; Bac. Abr. *Pleas*, &c. H. 4; Co. Litt. 282, b; 1 Saund. 21, 22-3; Com. Dig. *Pleader*, G. 18.

is, that the day, mentioned in the justification, may have been the day of the trespass complained of; and yet the justification may be false: upon which supposition, if the plaintiff were not permitted to deny the justification, he would necessarily be defeated of a recovery—though having a complete right of action: for, by the same supposition, he would not be able to prove the trespass on a *different* day.

When the right of recovery, as alleged in the declaration, is in its nature *divisible*, so that the plaintiff is by law entitled to recover for *as much as he can prove title to*, (though it should be less than he declares for), the defendant cannot make that part of his plea, which is in answer to a *part* of the plaintiff's demand, *the inducement to a traverse of the residue.*(*k*) For example: In an action for obstructing three of the plaintiff's lights, the defendant cannot justify as to *one* of them, with an *absque hoc*, that he obstructed *three*. For the plaintiff, in the case supposed, is by law entitled to recovery for the obstruction of *two*, or of *one* only, if his proof goes no further. Hence, even assuming that the justification pleaded is *true*, and also that only *two* lights were obstructed; yet the plea is ill. For if the plaintiff should join in the traverse, by re-affirming the obstruction of *three* lights, he would fail, on the trial, unless he could prove *three* lights obstructed—which, upon the state of facts now supposed, he could *not* do. And thus his action would be defeated, though he is, by the supposition legally entitled to recover for the obstruction of *one* light. In all cases like this, if the traverse were good, (upon which supposition, the plaintiff must join in it), it would oblige him to prove the *whole gravamen* alleged, in order to maintain his action; although the law confessedly entitles him to recover, on proof of *any part* of it. In the case here supposed, then, the defendant ought to plead,

(*k*) 1 Saund. 267-9; Com. Dig. *Pleader*, G. 20; Lawes' Pl. 118; Yelv. 225; 1 Bulstr. 116. *Vide* 8 Taunt. 190; 9 Pick. 66; Steph. Pl. 259.

as to the part not justified, i. e. two of the lights, *not guilty*; and as to the remaining one, to plead specially his matter of avoidance.

A traverse can properly be tendered, only on a point *material* (*l*)—for the obvious reason, that what is *immaterial* cannot decide the controversy. Hence matter of mere *inducement* or *aggravation* cannot, regularly, be traversed. Hence also, if a traverse includes *time* or *place*, when not material; it is ill. (*m*)

So also a traverse can properly be tendered only on an *issuable point*. (*n*) For what is not issuable cannot be put in issue; and therefore matter of *law* cannot be traversed (*o*): matter of *fact*, only, being traversable. Upon this principle, the *prout ei bene licuit*, ('as by law he well might') in a plea of justification, is not traverseable: as where the defendant pleads *son assault demesne*, and confesses his forcibly defending himself, *as he lawfully might*, &c. For these words are but a *conclusion of law* from the facts stated. (*p*)

Every traverse must be confined to a *single point*, i. e. a

(*l*) Com. Dig. *Pleader*, E. 34, G. 12, 14; Bac. Abr. *Pleas*, &c. H. 1; 6 Co. 24. a; Lawes' Pl. 118; 2 Saund. 5, 28; 1 Ib. 23, (n. 5.)

(*m*) Com. Dig. *Pleader*, G. 12, 14, R. 7, 8, 9; 2 Saund. 318; 12 Mod. 507.

These questions are all avoided by the rules of the Code.—*Deny distinctly all you mean to deny*. An *immaterial* averment, or a denial of an immaterial averment, works no substantial injury: it is in the way, and is unprofessional; and it may be struck out, on motion. 2 Comst. 165; 5 Sandf. 54; 6 How. Pr. 475; 3 Ib. 358; 3 Duer, 161; 4 Seld. 283.

(*n*) Com. Dig. *Pleader*, E. 34; Bac. Abr. *Pleas*, &c. H. 1.

(*o*) Id.; Com. Dig. *Pleader*, G. 12, 14; 1 Saund. 23, (n. 5.) 298; (n. 3.); 11 Co. 10; 2 Black. Rep. 776; 3 Wils. 234; 2 Keb. 607.

An allegation of the pleader's conclusion of law, from facts pleaded, is not traversable, and is not admitted by demurrer; *Hollis v. Richardson*, 13 Gray 392; *Everett v. Drew*, 129 Mass. 150; it need not be made; *McGhee v. Barber*, 14 Pick. 212; and, if made, may be rejected as surplusage. *Tucker v. Randall*, 2 Mass. 283; *Jones v. Dow*, 137 Mass. 119, 121.

(*p*) Id.

single ground of demand, or defence: otherwise it will be objectionable, as being *double*.(q) The meaning of the rule is, that when the pleading, on one side, consists of several *distinct* and material points, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only *one* of them. For in every such case, a denial of *one* of them is, in law, a sufficient answer to the whole; and he may traverse which of them he pleases.(r)

If therefore, in trespass for false imprisonment, the defendant justifies under a *capias* directed to the sheriff, and a warrant from the sheriff to himself, the plaintiff may traverse either the *capias* or the warrant, but should not traverse *both*. For the denial of either of them is a sufficient answer to the plea; since the *capias*, without the warrant, or the warrant, without the *capias*, would be no justification: and a traverse of both would, in effect tender *two* issues instead of one, upon one and the same plea. Upon the same principle, if the defendant pleads title in a stranger, and justifies as servant to the latter, and by his command; the plaintiff may traverse the *title*, or the *command*; but should not traverse *both*.(s)

But it is not indispensable, that the 'single point,' mentioned in the above rule, consist of a single *fact*: since two or more distinct facts may be, and often are, necessary to constitute one complete *point* or *ground* of complaint, or defence; and in such a case, *all* the particular facts, which go to that one point, may be traversed.(t) For example, to an action for trespass, for breaking and entering the plaintiff's

(q) Bac. Abr. *Pleas*, &c., H. 1, 5; 8 Co. 67; Co. Litt. 126, a; 1 Burr. 316, 321; 3 Lev. 40; 1 Bos. & P. 80; Lawes' Pl. 48, 152; Bull. N. P. 93.

(r) 1 Saund. 22 (n. 2.); 6 Co. 24, b; 1 Wils. 338. *Vide Duplicity*.

(s) 8 Co. 67, b.

By the Code, a party may deny each and all of the allegations against him;—or several of them; or one. Though it would, of course, be perfectly safe, to rely on the denial of *any one essential point*, or *ground*, of the claim, or defense.

(t) Bac. Abr. *Pleas*, &c., H. 1; 1 Burr. 320; Lawes' Pl. 153.

close, and depasturing it with beasts, &c. the defendant justified depasturing, &c. under a prescriptive right of common in the *locus in quo*, and alleged, according to the established form of pleading in such a case, that 'the cattle were *his own* cattle, and that they were *levant and couchant* upon the premises, and were commonable cattle,' (i. e. of the *species* of cattle, called commonable): The plaintiff traversed the *whole* of the last allegation, in the terms of it—thus including in the traverse the *three* distinct facts, that the cattle were the *defendant's own* cattle—that they were *levant and couchant*—and that they were *commonable*; and on a special demurrer to this replication, for duplicity, the traverse was held good. (u)

Of this case it may be observed, that the defence, to which the traverse applied, consisted of *three* distinct points:—
 a. The existence of a prescriptive *right of common*—b. The defendant's *title* to share in that right, as tenant of a manor, or lordship—c. That the particular beasts in question *were entitled to common*. The replication applied to the last point only, viz. that the beasts were *entitled to common*. But to entitle them to common, in the defendant's right, they must have been, as alleged in the plea, *his own* cattle—and also *levant and couchant* on *his* tenement—and *commonable* cattle. These *three* last facts, therefore, the plaintiff precisely traversed; and the court held that the traverse was not *double*—inasmuch as it embraced only the *simple point*, that the cattle were *entitled to common*.

In general, nothing but what is *expressly alleged*, or *necessarily implied* in what is thus alleged, can be the subject of a traverse. (v) For a traverse is in its nature a denial, on one side, of something before *alleged*, on the other. It would, indeed, be plainly absurd for either party to tender an *issue*

(u) 1 Burr. 316–322.

(v) Com. Dig. *Pleader* G. 8, 13; 1 Ld. Ray. 63; 1 Saund. 206, 312, d. (n. 4.); 2 Ib. 10 (n. 14.); 1 Salk. 298; Carth. —; Bac. Abr. *Pleas*, &c., H. 1, 5.

upon matter, which the other had not actually or virtually, pleaded. Still, a traverse may be taken upon matter which, though not *in terms* alleged, is *necessarily implied* in what is so alleged. (w) Thus, if the defendant justifies under J. S. alleging that he *was seised* of the close in question; the plaintiff may reply that he himself was seised of one moiety of the close, *absque hoc* that J. S. was *sole* seised. (x) For though the plea does not expressly aver that J. S. was *solely* seised; yet the general unqualified averment, that he was seised '*of the close,*' must be understood to mean a seisin of the *whole*, or a *sole* seisin.

But there is one case, in which it is necessary to include, in a traverse, what is neither expressly nor impliedly alleged on the other side: viz. when to debt on an obligation, payable '*on or before*' a certain day, (as the *tenth* day of May), the defendant pleads payment, on a day *before* that named in the condition, (as the *first* day of the same month): in which case, if the plaintiff would deny the plea, he must reply that the defendant did not pay on the *first* of May, nor at any time *before the tenth, nor on the tenth.* (y) For a traverse of payment on the *first* of May, without more, would not show an *absolute breach* of the condition of the bond, (which the replication must always show, when the defendant pleads *performance* of the condition), and consequently would not show a right of recovery. For such a traverse would be consistent with the supposed fact of payment on the *tenth*, or on any previous day, except the first; and payment, on either day, would be a strict performance of the condition. And since the statute 4 & 5 Ann. ch. 16, § 12, has made payment *after* the day a good defence, the traverse, it seems, should cover *all*

(w) Id.

(x) 6 Mod. 158; 2 Salk. 629; Com. Dig. *Pleader*, G. 13.

(y) Sav. 96; 1 Black. Rep. 210; Com. R. 148; Esp. Dig. 225; 2 Burr. 944.

time subsequent to the day named in the condition, and before the commencement of the suit.(z)

It has already been seen that when a traverse and its inducement both go to the *same point*, and are properly adapted to each other, the traverse is but an *inference* from the inducement; and hence it follows, that in every such case, *joining* in the traverse necessarily involves a *denial* of the matter alleged in the inducement. Thus, if the defendant pleads that J. S. died seised in fee, and the plaintiff replies that he died seised *in tail, absque hoc* that he died seised *in fee*; a rejoinder, re-affirming that he died seised *in fee*, is self-evidently a denial of the *inducement* to the traverse.

On the other hand, when the inducement and the traverse go to *different points*, (as in the case of a traverse *after* a traverse,) *joining* in the traverse, first tendered, *admits* the truth of the inducement. Thus, if the defendant in trespass pleads a justification, (as a license), laid on some particular day, different from that laid in the declaration, and traverses that he is guilty on *any other* day; a replication, *joining* in the traverse, by alleging a trespass on *another* day than that laid in the plea, is an implied *admission* of the license, or other matter of justification averred in the inducement: it being a general principle, heretofore stated, that each party impliedly admits all such traverseable allegations on the other side, as he *does not* traverse. And in the example now given, the plaintiff, instead of *joining* in the traverse, *might* have traversed *the inducement*. It may also be observed, that in the case just supposed, (as in every similar case), if the replication is true, and supported in proof; the plaintiff can suffer no *disadvantage*, from his admission of the inducement, even though the latter should be *untrue*; because, even upon this supposition, he must prevail on *the issue* tendered by the defendant.

If, however, the party *joining* in such a traverse, wishes to

prevent his implied admission of the inducement from operating against him, as an *estoppel* in any *future* controversy; he may attain the end, by a *protestation*, or, (as it is often called) a *protestando*; and in general, any allegation or inference, which stands impliedly admitted by the *pleadings*, may, to the same effect, be denied or excluded, in the same manner. (a)

A *protestation*, which, according to Sir Edward Coke's definition, is 'the exclusion of a conclusion,' has no other effect, than that of excluding or preventing some adverse allegation, or inference, (which stands confessed by the pleadings), from *estopping* the party protesting, in any *other* suit between the same parties, or their *privies*. (b) For it is a general principle, in the law of evidence, that any fact, admitted by the *pleadings* in a suit, will, if not thus excluded, be forever *conclusive*, (between the same parties, and those in privity with them), in any other suit, in which the same fact may come in question.

Thus, if the defendant pleads in bar a collateral satisfaction

(a) 3 Black. Com. 311; Bac. Abr. *Pleas*, &c., H. 1, 4; Co. Litt. 124 b, 126; Plowd. 276, b; 2 Saund. 103, a. b. (n. 1.); Litt. § 192-3.

(b) Id.; 2 Saund. 103, a. (n. 1.); Lawes' Pl. 141, 143; Com. Dig. *Pleader*, N.

Replication, *precludi non*; because *protesting that the defendant did not give notice to the plaintiffs in manner and form as the defendant has above in her plea in that behalf alleged*.

The legal effect of a *protestation* is so different from what the words seem to import, and from the sense in which they are frequently understood by persons not acquainted with the form of pleading, that it may not be improper to state that the above words in *italics* are to be understood thus: "Admitting, for the purpose of the present action, and in order to entitle the plaintiffs to attack some other part of the defendant's plea, that the defendant *did* give notice to the plaintiffs in manner and form as the defendant has above in the said plea in that behalf alleged, but *protesting* against this admission being used against them, the plaintiffs, on any other occasion, and reserving to them the right to say on such other occasion, *that the defendant did not give notice to the plaintiffs in manner and form as the defendant, as above, in her said plea in that behalf alleged*," etc. 1 Man. & Ryl. 500, note.

—as a pipe of wine—delivered to the plaintiff, and by him accepted, in full satisfaction; and the plaintiff, wishing to put the *acceptance only* in issue, is nevertheless unwilling to let the fact of *delivery* stand, as an *estoppel* to him in any other case; he may deny the delivery, by a *protestation*, and then, ‘for replication,’ traverse the acceptance. (c) And in general, when on one side, *two* material facts are pleaded, of which the opposite party can traverse but one, without making his pleading double, he may exclude the other, to the intent above explained, by a *protestation*. (d)

A protestation is, strictly, no part of *the pleadings*, and is distinguished from them in its form, by always commencing with the word, ‘protesting,’ or in Latin, ‘*protestando*.’ (e) It has therefore no effect whatever, in *the principal case*, the legal merits of which are, upon the face of the record, precisely the same as if the protestation were omitted. Indeed all traversable facts, which are *denied* under a protestation, are for the purpose of deciding the principal cause, *admitted*. (f) Thus, in the case last stated, the delivery of the wine, which the protestation *denies*, stands upon the face of the record, (so far as regards *that case*), *as confessed*.

From these principles it follows, that a protestation requires *no answer*; and that the facts, denied or excluded by it, require *no proof*. (g) Hence it also follows, that a protesta-

(c) 2 Chitt. Pl. 602, 644–5; 1 Lill. Ent. 105, 106.

(d) 2 Chitt. Pl. 602.

Under the Code, wherever, by reason of the defendant’s making a counter-claim, or on the motion of the defendant, there is need of any denial of the defendant’s answer, on the part of the plaintiff;—*both facts* (as by the examples in the text) can be denied separately, or generally. If there be no counter-claim *requiring a reply*; or *no reply* is called for; they are *all denied* by being ‘*deemed controverted*’ (Code, § 522;)—which would seem to be a sort of *Code fiction*.

(e) Lawes’ Pl. 141; 2 Chitt. Pl. 602; 2 T. R. 441.

(f) Bac. Abr. *Pleas*, &c., H. 4; Lawes’ Pl. 141–3.

(g) Com. Dig. *Pleader*, N.; Bac. Abr. *Pleas*, &c., H. 4; Lawes’ Pl. 143.

tion, which is *idle or superfluous*, or even *repugnant to the pleading*, with which it is connected, does not injure the pleading, even on special demurrer (*h*); since the protestation forms no part of the pleading. Such a protestation is, however, of no avail, and cannot, therefore, exclude an *estoppel*. (*i*)

And it seems, that in general, a protestation does not avail the party protesting, if the issue be found *against* him (*j*): The reason of which may perhaps be, that as his *pleading* is found to be false; the protestation is, therefore, presumed to be so. This rule, however, appears to apply only to those cases in which the facts protested against might have been directly *traversed*. (*k*) When the issue is found *in favor* of the party protesting, the protestation has its full intended effect, as above explained. (*l*) It is also observable, that a protestation is the only mode of denying such facts, as cannot be put *in issue*. (*m*)

The inducement to a traverse must consist of *issuable* matter—whether the inducement and traverse go to one and the same point, or to different points. (*n*) The correctness of this rule has been questioned, as it regards cases, in which the inducement and traverse both go to *the same* point. (*o*) For as the party, to whom such a traverse is tendered, must (regularly) join in it, (if material), and cannot traverse the inducement (*p*); why, it may be asked, is it necessary that the inducement should consist of *issuable* matter? It will appear,

(*h*) Com. Dig. *Pleader*, N.; Plowd. 276, b.; Lawes' Pl. 142.

(*i*) Id.

(*j*) Co. Litt. 124, b.; 126, a.; Com. Dig. *Pleader*, N.; 2 Saund., 103, a., b. (n. 1.); Lawes' Pl. 142.

(*k*) 2 Saund. 103, a., b. (n. 1.)

(*l*) 2 Saund. 103, c. (n. 1.).

(*m*) Plowd. 276, b.; Lawes' Pl. 141.

(*n*) Bac. Abr. *Pleas*, &c., H. 1; Com. Dig. *Pleader*, G. 20; Cro. Car. 336; 3 Salk. 353; 2 Leon. 32.

(*o*) Bac. Abr. *Pleas*, &c. H. 1, *in notis*.

(*p*) Because a traverse of the inducement would be a traverse *upon* a traverse.

however, upon examination, that the rule is founded upon sound principle. For,

a. When the inducement and the traverse go to *the same* point, they cannot, in the nature of the thing, be properly adapted to each other, unless the traverse follows, as a *necessary inference*, from the inducement; so that if either of them is true, the other must necessarily be so. Indeed, the inducement and the traverse, when thus adapted to each other, (as they must be, in order to be secure against a demurrer), assert substantially the *same thing*, though in different forms—the one being in the *affirmative*, and the other in the *negative*. It is clear, therefore, when they are thus adapted to each other, that if the *traverse* consists of issuable matter, as it confessedly must; the *inducement* will, and must of necessity, consist of similar matter, or rather of *the same* matter, differently expressed.

This exposition of the rule may be sufficiently illustrated, by a single and very simple example:—If a defendant pleads that his co-defendant is dead, and the plaintiff replies that he is alive, *absque hoc* that he is dead; the inducement, (that he is alive), asserts in substance the *same* fact, as does the traverse: that ‘he is *alive*,’ and that ‘he is *not dead*,’ being in effect the same proposition, expressed in different terms; and a denial of either of these assertions is a denial of the other. It is manifest then, that if the *traverse*, in this case, consists of issuable matter; so necessarily, does the inducement. A similar explanation will be found applicable to every other instance, in which the inducement and traverse go to the *same* point, if they are adapted to each other; and if not, the pleading is, for that cause demurrable. (q)

b. When the inducement and traverse go to *different* points, (of which, it is believed, no instance occurs, except in the defendant’s plea), the rule requiring the inducement to consist of *issuable* matter, is founded on equally clear, though

(q) Cro. Car. 266, 336; Com. Dig. *Pleader*, G. 20.

different, reasons from those mentioned above. In cases of this kind, the inducement is, itself, traversable; as it forms a *substantive and distinct ground of defence*, not embraced in the traverse, and is indispensably necessary, to render the defence *complete*, or *co-extensive* with the declaration. And it is manifest, that whatever constitutes the defendant's *answer* to any material part of the complaint, must itself be *material*, and capable of being put *in issue*. Thus, if in trespass, the defendant justifies for a *single day*, with a traverse that he is guilty on any other day; it is obviously necessary that the matter of justification, which constitutes the inducement to the traverse, be, itself, *material* and *issuable*; since the defence would otherwise be defective in substance, as not answering the *whole gravamen*. The rule, then, that the inducement to a traverse must consist of *issuable* matter—whether it goes to the same point as the traverse, or to a different point—appears to be fully supported by the sound principles of pleading.

It has been supposed by some (r), that an *inducement* to a traverse is but an arbitrary form, answering no useful purpose, and therefore always unnecessary. And it is doubtless true, that where the inducement and traverse go to the *same* point, (in which case the inducement cannot, in general, be itself traversed or otherwise answered), an inducement, in many cases answers no necessary purpose. But on the other hand, it is certain that in many cases, an inducement is at least useful, and in some, absolutely necessary.

Thus, a. Where the inducement and traverse both go to the *same* point, the former must, in fair and liberal practice, be deemed *useful*, in disclosing the *particular grounds or facts*, on which the traverse is founded, and by which it is to be maintained in proof. b. In many cases of this kind, an inducement is indispensably *necessary*, to avoid a *negative pregnant*, which the traverse would otherwise be.

(r) 1 Swift's Dig. 629.

c. Where the inducement and traverse go to *different* points, the inducement as has just been shown, is a *substantive and indispensable part of the defence*. It may also be suggested, that an inducement, by way of *protestation* (which is, indeed, no part of the *pleadings*), may often be necessary, for the purpose of excluding an *estoppel*.

CHAPTER V.

OF DEMURRER.

To *demur* is to *rest*, or *pause*; and the party who demurs in law, to, (or upon,) his adversary's pleadings, *rests*, or *pauses* upon it, as requiring *no answer*, by reason of its supposed legal insufficiency. (a)

(a) Reg. Pl. 125; 3 Black. Com. 314.

[If demurrer raises an issue of law not of fact. "He that demurreth in law is said to abide in law." *Pickens's Ex'rs v. Kinseley*, 36 W. Va. 794, and authorities cited.

The office of the demurrer is to point out specifically the defects so that the opposite party may amend. *Bryant v. Ala. Gt. So. R. Co.*, (Ala.) 46 So. 484. If the demurrer is sustained the matter demurred to is eliminated. *State v. Portland Glue Elect. Co.* (Oreg.) 95 Pac. 722.

A demurrer, as distinguished from a motion to strike out, addresses itself to a pleading which, however defective it may be, is properly before the court. *Goodrich v. Alfred*, 72 Conn. 257, 261.

The sufficiency of a pleading, on demurrer thereto, is to be determined by what appears therein. *Douglass v. P. Ins. Co.*, 138 N. Y. 209. And, for the purposes of the demurrer, the demurrant may consider the copy of the pleading served on him as the true copy. *Hunter v. Miller*, 101 Wis. 583. Affidavits filed with the pleading are not to be considered. *Strawbacker v. Ives*, 114 Ia. 661. But exhibits referred to as a part of the complaint are, for this purpose, a part thereof. *Taylor v. McLea*, 11 N. Y. Suppl. 640; *Goodyear Co. v. Selz, Schwab & Co.*, 157 Ill. 186, 193. "When, in any case, an exhibit as attached is the foundation of the cause of action or defense to which it relates, the validity or sufficiency thereof, as a matter of law, to constitute or establish such cause of action or defense, may be determined on demurrer to the pleading to which it is attached." *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 191, per Brown, J.

On demurrer a complaint is sufficient if it contains facts enough to constitute a cause of action, no matter how much irrelevant, redundant or impertinent matter it contains. *Coatsworth v. Lehigh Valley R. Co.*, 24 App. Div. 273, and authorities cited. And see

A demurrer as has before been shown, is, in strictness, *no plea* (b); since it neither asserts nor denies any matter of *fact*, but merely advances a *legal* proposition, viz. that the pleading, demurred to, is *insufficient in law*, to maintain the case shown by the adverse party. It may be taken by either party, and to *any party* of the pleadings, until issue joined. (c)

A demurrer, though frequently called 'an issue' in law (d) may, with more propriety, be said to *tender* such an issue. For the issue is not formed, until there is a *joinder* in demurrer; which affirms the legal *sufficiency* of the allegations demurred to, in contradiction of the demurrer, which affirms their legal *insufficiency*. (e)

Arnold v. Kutinsky, Adler & Co. (Conn.) 69 Atl. 350; *Jones v. Henderson*, (N. C.) 60 S. E. 894.

On demurrer all the pleadings are to be examined. Thus, a demurrer to the answer relates back to the complaint. *Lyndon Lumber Co. v. Sawyer*, (Wis.) 116 N. W. 255. And judgment will be given against the party who filed the first defective pleading. *Mayer v. Roche*, (N. Y.) 69 Atl. 246; *Bank of Miller v. Moore*, (Neb.) 116 N. W. 167; *Schiefer v. Freygang*, 109 N. Y. Suppl. 848.

"During a trial to the jury the legal sufficiency of the material facts put in issue by the allegations of the complaint and the denials of the answer, cannot be questioned * * *. The legal sufficiency of such facts must be settled by demurrer before the issues are joined and put to the jury, or else, after the verdict is returned by a motion in arrest of judgment or by a writ of error * * *.

"This rule has not been changed by the Practice Act. The elimination of all questions as to the legal sufficiency of the facts alleged on which issues are actually joined, form the trial to the jury of the issues so joined, if not more essential, is certainly as essential to the ordinary conduct of an action under the new system of pleading as under the old." *Cook v. Morris, Ex'r*, 66 Conn. 196, 204, per Hammersley, J.]

(b) 3 Wils. 292; Bac. Abr. *Pleas*, &c. N. 1.

(c) Co. Litt. 72. a; Reg. Pl. 126; Bac Abr. *Pleas*, &c. N. 1; Com. Dig. *Pleader*, Q. 6; 1 Lill. Ab. 435.

(d) 3 Black. Com. 314, 315; Co. Litt. 71-2.

(e) 2 Chitt. Pl. 678, 682; 3 Black. Com. App. No. III, § 6.

Under the Code, *taking* the demurrer makes the issue. No joinder is required. If the pleading demurred to be not *amended*, the demurrer is ready for argument, as put in.

As the office of a demurrer is to deny, not the *truth*, but only the *legal sufficiency*, of the allegations demurred to; it there-

Demurrer is the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side.

Demurrers are of two kinds, *general* and *special*. When the grounds of objection are specially and particularly set down and expressed, the demurrer is called a *special* demurrer; when not, it is called a *general* demurrer.

In practice, there is now but one kind of demurrer, and this is admissible only when the pleading of the opposite party is bad in substance. Objections which could formerly be taken by special demurrer,—as objections on the ground of argumentativeness, want of particularity, repugnancy, duplicity, etc.—when not amounting also to matter of substance, are, in most jurisdictions, no longer grounds of demurrer and are to be remedied, if necessary, by the summary method provided by the statutes and by the general summary jurisdiction of the court.

The effect of a demurrer is that the party demurring thereby confesses on the record that for the purpose of the demurrer all the matters of fact pleaded are to be taken to be true; but denies that they are sufficient in their legal effect to constitute the right or defence which is maintained by the other side. An issue in law is thus raised which is decided by the court after argument.

It is the effect of a demurrer, to admit the truth of all matters of fact sufficiently pleaded on the other side; but it cannot be said, *à converso*, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged. Stephen Pl. 2d ed. 178; Pollock, C. B., in *Elworthy v. Sanford*, 3 H. & C. 335; *Hopper v. Covington*, 118 U. S. 148.

There are three forms in which the object of demurrers may be obtained: first, by raising on the pleadings a question of law, so that the parties may have it decided quickly; secondly, by raising the question on a pleading whether it discloses any reasonable cause of action, or answer, in which case the court may order the pleadings to be struck out, not necessarily disposing of the whole action; and thirdly, in case an action or defence is shown by the pleadings to be frivolous and vexatious, then the court or a judge can dismiss the whole action, or order it to be stayed, or judgment to be entered accordingly, as may be just. Earl of Selborne, L. C., in *Burstall v. Beyfus*, 26 Ch. D. 38. If a declaration does not set forth any known cause of action, even imperfectly, a demurrer assigning that it does not state any legal cause of action is sufficient. The cause of demurrer could not well be more specifically assigned. *Johnson v. Reed*, 136 Mass. 421.

fore *admits* all such facts alleged by the adverse party, as are *well pleaded* (*f*); and refers the question of law, arising upon them, to the court.

The court upon the argument of a demurrer (except in the case of a demurrer to a plea in abatement) will look over the whole record, and consider as well the previous pleadings as the particular pleading demurred to, and give judgment for the party who on the whole appears to be entitled to it. But a plaintiff is not entitled to recover in respect of a cause of action which is not stated in his declaration and is disclosed only in the defendant's plea. *Marsh v. Bulteel*, 5 B. & Ald. 507.

When a pleading is clearly bad in substance, it is generally ad-

(*f*) 1 East, 636; Bac. Abr. *Pleas*, &c. N. 1. 3; Co. Litt. 71. b; 1 Saund. 338. (n. 3.); Hob. 233; Com. Dig. *Pleader*, Q. 5. 6; 1 Lill. Ab. 437-8.

[A demurrer admits facts well pleaded.. *Calhoun v. Pullman Co.*, 159 Fed. 387. The demurrer admits the truth of traversable facts, but not the truth of such of them as merely express the opinion of the demurrant, or his conclusions from the facts alleged. *Ford v. Peering*, 1 Ves. Jr. 77, 78; *United States v. Ames*, 99 U. S. 35, 45; *Dillon v. Barnard*, 21 Wall. 430; *Lea v. Robeson*, 12 Gray, 280; Story Eq. Pl. § 452; Elliot's Appeal, 74 Conn. 586; *Greef v. Eq. Life Assn. Soc.*, 160 N. Y. 29. And see, *Pein v. Mignerr*, (Ind.) 84 N. E. 981; *Ellis v. Keeler*, 110 N. Y. Suppl. 542; *Gill v. Manhattan Life Ins. Co.*, (Ariz.) 95 Pac. 89), nor mere surplusage. (*Ga. Home Ins. Co. v. Warten*, 113 Ala. 479, 486, citing Chitt. Pl. 661).

Such matter is not the proper subject of a substantive averment, or of a traverse, or avoidance, and consequently not a subject of admission in the pleadings. *Millard v. Baldwin*, 3 Gray. 484.

Statements made on information and belief are not admitted by a demurrer, when, in the particular case, the statute required the petition to be verified by oath. *Hart v. Burbank*, 73 Vt. 273.

But the admission by a demurrer is not an absolute admission. *Rice v. Rice*, 13 Oreg. 337. Whatever it may amount to it is only for the purpose of the argument on the demurrer, and not as evidence for the party alleging the facts demurred to. *State's Attorney v. Selectmen of Bradford*, 59 Conn. 402, 411, and cases cited; *Sinn v. Dischamp*, 138 Ind. 502. And see *Belden v. Black*, 124 Mich. 667. It is not as a rule of evidence that the demurrer admits anything: it admits facts that are well pleaded for the sole purpose of determining their legal sufficiency. *Havens v. Hartford & Atl. R. R. Co.*, 28 Conn. 69, 90].

. But a demurrer regularly admits no other facts, than those which are *well pleaded*; and by the *common law*, which does not distinguish between the offices of a demurrer, assigning

visable to demur to it, as the judgment upon the demurrer (except a judgment for the plaintiff on a demurrer to a plea in abatement) will be final, and determine the cause, or the part of it to which the demurrer relates, in the simplest and cheapest manner; and the demurrer will prevent the possibility of the defect being aided by pleading over or by verdict.

But although a party may elect not to demur to a defective pleading, he may be able to object to it at a later stage, either upon a subsequent demurrer, or by motion in arrest of judgment, or for judgment *non obstante veredicto*, or by error.

When a pleading states a deed or an agreement or other written document according to its supposed legal effect, and the opposite party admits the instrument in fact, but disputes the construction put upon it, it is often convenient for the latter to set out the writing verbatim in his pleading in order that the party relying on the document may be compelled to demur, and so raise the question as to the legal construction upon the demurrer.

At common law a party has the alternative either to plead or to demur to the pleading of his opponent, but is not at liberty both to plead and demur to the same pleading. *Bayley v. Baker*, 1 Dowl. N. S. 891.

The demurrer should be confined to that part of a declaration which is insufficient. If there are several counts in the same declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so much as is good. 1 Wms. Saund. 6th ed. 285 b; 1 Wms. Notes to Saund. 432, 433; *Briscoe v. Hill*, 10 M. & W. 735. So where a declaration assigned two breaches, and one of them only was well assigned, but the demurrer went to the whole declaration, the judgment for the plaintiff was confined to that breach which was well assigned. *Slade v. Hawley*, 13 M. & W. 757.

Upon a demurrer to one count or part of a count the plaintiff may enter a nolle prosequi as to the causes of action to which the demurrer is pleaded, *Miliken v. Fox*, 1 B. & P. 157; *Bertram v. Gordon*, 6 Taunt. 445, or to the residue of the declaration. But the defendant cannot enter a nolle prosequi as to part of the matter demurred to, where by so doing he would take away the grounds of demurrer; as in the case of a demurrer to the whole declaration for a misjoinder of counts, a nolle prosequi cannot be entered as to one of the counts. *Drummond v. Dorant*, 4 T. R. 360; *Butler v. Mapp*, 10 Bing. 391.

a special cause, and one assigning none, a demurrer of either kind confesses no other allegations, in general, than such as are sufficient, both in *substance* and *form*.(g) But facts, insufficient in *substance*, cannot affect the right of the cause; and *material* facts, if *ill pleaded*, and demurred to, even generally, are by the common law, as unavailing, as if they were altogether *immaterial*.

The rule, that a demurrer does not confess facts *ill pleaded*, means only, that it does not confess them, to the intent of *concluding* the party demurring, by way of *estoppel*, in any other suit, or of affecting the *determination* of the principal case.

The pleading of a party may be ill, either in not alleging sufficient *matter*, or in alleging what is sufficient, in an informal or improper *manner*.(h) And in neither case, is the matter, which is pleaded, confessed, according to the rule of the *common* law, even by a general demurrer. For by the common law, advantage might, in general, be taken of defects in *form*, by a demurrer of the same kind, as would reach defects in *substance* (i): though now, in consequence of statute-enactments, there exists an important difference, as regards the manner or demurring, between *formal* and *substantial* faults in pleading.

To explain this difference, it must be observed, that demurrers are of two kinds—*general*, and *special*: the latter being called ‘special,’ because they assign some *special cause* of demurrer; while the former assign none.(j) But at *common* law the distinction, between the one and the other, consisted in the mere *form* of demurring; since the office and effect of both, as has been before suggested, were the same:

(g) Hob. 233; Lawes’ Pl. 167; 3 Salk. 122; 1 Chitt. Pl. 640; Com. Dig. *Pleader*, Q. 5; Bac. Abr. *Pleas*, &c. N. 3.

(h) Hob. 164; Bac. Abr. *Pleas*, &c. *Introd.*

(i) Lawes’ Pl. 167–8; Com. Dig. *Pleader*, Q. 5.

(j) Co. Litt. 72. a; Bac. Abr. *Pleas*, &c. N. 5; Lawes’ Pl. 167, 168; 2 Bulstr. 267.

faults, in mere *form*, being reached, at common law, as well by a *general*, as by a *special* demurrer. (*k*)

But by the statute 27 Eliz. c. 5, § 1, on demurrer to the pleadings, on either side, (other than *dilatory* pleas), all defects and imperfections, merely *formal*, except such as are expressly and specially '*set down*,' and *assigned* for cause of demurrer, *are aided*, and may by the court, be amended. (*l*) By the operation of this statute, all merely *formal* defects in pleading, except in *dilatory* pleas, are aided on general demurrer.

But doubts having arisen, upon the construction of this statute, whether certain particular defects in pleading were to be deemed formal, or substantial; the statute 4 & 5 Ann. c. 16, was enacted, partly in explanation and partly in extension of the healing operation of the former act—and also expressly specifying a variety of particular defects, which, though before deemed *substantial*, are, by this latter act, virtually converted into matters of *form*, and thus aided on

(*k*) To this proposition there appears to have been a single exception, and but one, viz. in the case of demurrer for *duplicit*y; for taking advantage of which, the demurrer, it seems, must, by the common law, have been *special*, (3 Salk. 122; Comb. 297; Bac. Abr. *Pleas*, &c. N. 6.) The reason of this exception may, perhaps, have been the *peculiarity* of this particular fault; which consists neither in want of substance, nor in the absence of technical form, in the pleader's averments; but in the statement of *superfluous* matter—of *more* substance than is necessary.

Under the Code, there are none but *special* demurrers;—or rather none but demurrers for *substance*: since, 'that the complaint does not state facts sufficient to constitute a cause of action,' is *general* enough, in form; and very nearly in the form of a general demurrer before the Code. It has been held (13 How. Pr. Rep. 413,) that the same *generality* is allowable, in what is properly matter of *abatement*; (—'that the plaintiff has *not the legal capacity to sue*;'—) whereas, on principle, matter of abatement should be so *specially* stated, as 'to give the plaintiff a better writ;'—i. e. tell him the *precise difficulty*, so that he can well amend.

(*l*) Bac. Abr. *Pleas*, &c. N. 6; Lawes' Pl. 167–8–9; Com. Dig. *Pleader*, Q. 7.

general demurrer. (m) The statute of *Elizabeth*, then, requires demurrers to be special, for formal defects, *in general*; and that of *Anne*, after re-enacting the same *general* provision, extends, or applies it to certain *particular* defects, expressly named in the act.

These statutes, however, relate to pleadings in *civil* actions only—being confined, in their terms, to proceedings in any ‘*action or suit* ;’ and the former contains an express *proviso*, that it shall not extend to *criminal* proceedings. (n) Formal defects, in *indictments* and other *criminal* prosecutions, remain, therefore, proper subjects of *general* demurrer, as at common law. The statute of *Anne* also contains a *proviso*, that it shall not extend to *actions on penal statutes*, which are strictly civil suits. But this last *proviso* was repealed by the statute 4 Geo. 2, c. 26, § 4. (o)

There is also, in *civil* cases, as has before been suggested, one class of pleas, to which these statutes do not extend, viz. pleas *in abatement* or rather *dilatory* pleas, generally. (p) For these pleas, not being *favoured* in the law, are held not to be within the spirit of these enactments; the object of which, as expressed in the title of the statute of *Elizabeth*, is for the ‘*furtherance of justice*.’ (q) In *dilatory* pleas, therefore, defects in *form* are still reached by *general* demurrer. The same rule holds, and for the same reason, of demurrers to *writs of*

(m) Bac. Abr. *Pleas*, &c. N. 6; 1 Lill. Ab. 439, 440; 1 Chitt. Pl. 641–3.

The defects *specifically enumerated*, and cured, by this latter statute, are *immaterial traverses*—the omission of *profert* of deeds, &c.—or of the words *vi et armis*, and *contra pacem*—or of a verification *per recordum*—or of a *prout patet per recordum*. All these defects are therefore aided by this statute, on demurrer, unless specially assigned for cause of demurrer.

(n) Bac. Abr. *Pleas*, &c. N. 6; Com. Dig. *Pleader*, Q. 7.

(o) Willes, 601; Tidd, 822; 1 Chitt. Pl. 642.

(p) Ld. Ray. 337. 1015; 1 Salk. 194; Tidd, 885; 3 T. R. 186; 1 Chitt. Pl. 456; 2 Ib. 679; 2 M. & S. 485; 1 Mass. 501–2.

(q) Hob. 232.

578 GENERAL AND SPECIAL DEMURRERS.

error, for duplicity, in assigning errors in fact, and in law, together. (r)

As the, *general* enactments, above referred to, in these two statutes, are precisely similar, even to the letter; (those in the statute of *Anne* being only a *repetition* of the first section of that of *Elizabeth*); it will be sufficient—so far as regards the different natures and offices of general and special demurrers—to explain the provisions of the statute of *Elizabeth* only: that act being the original foundation of the important distinction, which now exists in the *English* law, between the uses and effects of the two kinds of demurrer.

It has been observed, in a former chapter, that to all good pleading there are two requisites:—first, That the *matter* pleaded be sufficient; and second, That it be alleged, according to the forms of law. (s) The omission of either of these requisites is, therefore, a good cause of demurrer. But as, under the above-mentioned statute of *Elizabeth*, defects of the *latter* kind can be reached only by *special* demurrer; it becomes necessary to distinguish, correctly between the two kinds of demurrer.

A *general* demurrer is one, not specially assigning any particular cause of demurrer, but simply asserting, in general terms, the legal insufficiency of the pleading, to which it applies (t) A *special* demurrer is one which assigns, and points out specially, some particular *cause, or causes*, for *demurring*. (u)

But to constitute a *special* demurrer, within the statute

(r) Sty. 69; Carth. 338-9; Bac. Abr. *Error*, K. 2.

(s) Hob. 164; Bac. Abr. *Pleas*, &c. *Introd.*; Co. Litt. 303.

(t) [*Mutual Acc. Assce. Co. v. Tuggle*, 138 Ill. 428; *Cairns v. Whittemore*, 88 Me. 501; *Thompson v. Fox*, 21 Misc. 298.

Reasonable Intendment, as distinguished from necessary, is all that is required on general demurrer].

(u) Co. Litt. 72. a; Bac. Abr. *Pleas*, &c. N. 5; Lawes' Pl. 167; [*Hare v. Dean*, 90 Me. 308. In many states, where the special demurrer is abolished, advantage can be taken of defects in form only by a motion to strike out].

of *Elizabeth*, some specific cause of demurrer must not only be assigned, but must be assigned and set out *pecially*.(v) The assignment of a cause, in general terms, does not answer the requisition of the statute; which is, that the cause be '*pecially and particularly* set down.' Hence, a demurrer for *duplicity*, assigning for cause, merely that the pleading demurred to, 'is *double and informal*,' is considered as a *general* demurrer, and will not reach the fault mentioned. The demurrer, for such a cause, should point out, *pecially* and *precisely*, *where, and in what particular*, the duplicity consist.(w) And the same particularity is necessary, in all demurrers for faults in mere *form*. For the object proposed, in requiring a demurrer, in any case, to be special, is that the *precise point*, in which the fault, in the pleading demurred to, consists, be designated as cause of demurrer.

The difference between matter of form, and matter of substance, in general, under the statute of *Elizabeth*, as laid down by Lord *Hobart*, is, that *that*, 'without which *the right* doth sufficiently appear to the court,' is *form*; but that any defect, 'by reason whereof the *right appears not*,' is a defect in *substance*.(x) But this description is too general, to be easily applied in particular instances.

A distinction, somewhat more definite, is, that if the *matter* pleaded be in itself insufficient, without reference to the *manner* of pleading it, the defect is *substantial*; but, that if the only fault is in the form of alleging it, the defect is but *formal*.(y) Thus, the omission of a *consideration*, in a declaration in *assumpsit*—or of the performance of a *condition precedent*, when such a condition exists—of a *conversion* or *prop-*

(v) 1 Wils. 219; Bac. Abr. *Pleas*, &c. N. 5; 1 Show. 250; Comb. 297; 2 Ld. Ray. 802.

(w) Comb. 297; 1 Salk. 219; 1 Show. 250; Com. Dig. *Pleader*, Q. 9; Hob. 232; 2 Mass. 283-4.

(x) Hob. 233.

(y) Doug. 683; [*Camp Bros. v. Hall*, 39 Fla. 535; *City of Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432].

erty in the plaintiff, in *trover*—of *science* in the defendant, in an action for mischief done by his dog—or *malice*, in an action for malicious prosecution, &c. are all defects in *substance*. On the other hand, *duplicity*—a *negative pregnant*—*argumentative* pleading—a special plea, *amounting to the general issue*—omission of *day*, when the time is immaterial—of a *place*, in transitory actions, &c. are only faults in form. (z) For the defect, in the former class of examples, is in the *matter* pleaded; while the fault in the latter, is only in the *manner* of pleading.

A special demurrer reaches no *other* faults in *form*, than those which are specially assigned for cause of demurrer. (a) For as to all others, it is, in effect, a *general* demurrer; under which, no advantage can be taken of imperfections, merely *formal*.

But under a special demurrer, advantage may be taken, as well of all *substantial* defects, though not assigned for cause, as of those formal faults, which are so assigned (b); and this, for the reason last before stated, viz. that as to faults, *not* so assigned, a special demurrer operates precisely like a *general* one.

It has already been stated, that by the common law, a demurrer confesses no other facts, alleged on the other side, than such as are, in *all* respects, well pleaded—that is, such as are sufficient, both in *matter* and *form*. And under the statute 27 *Eliz.* the rule in regard to insufficient *matter*, is the same as at common law. (c) But under this statute, a de-

(z) Bac. Abr. *Pleas*, &c. N. 5. 6; Com. Dig. *Pleader*, Q. 7; 10 Co. 95. a; 2 Stra. 694.

(a) Bac. Abr. *Pleas*, &c. N. 5; 10 Co. 88; Com. Dig. *Pleader*, Q. 8; [*Iron Clad Doyer Co. v. Chicago Trust & Savings Bank*, 50 Ill. App. 461; *Steffe v. Old Colony Railroad*, 156 Mass. 262; *Thompson v. Fox*, 21 Misc. 298].

(b) Id.; 6 Greenleaf, 426; [*Ellison v. Georgia Rd. Co.*, 87 Ga. 691, 701-702].

(c) Lawes' Pl. 168; Bac. Abr. *Pleas*, &c. N. 3; Com. Dig. *Pleader*, Q. 6; 2 Salk. 561.

murrer confesses not only all *sufficient matter, well pleaded*, as it does by the common law; but also, all *material facts, informally* pleaded, except such as are expressly and specially assigned for cause of demurrer. (d)

As under this statute, defects *in form* are aided, unless specially pointed out in a demurrer; it follows, that all such defects are now aided, by the adverse party's *pleading over*, instead of demurring specially. In this way, therefore, *formal* defects in the declaration are aided, by the defendant's pleading in bar, either by way of traverse, or in avoidance; in the same manner, those in the plea are cured by a *replication*; and the same rule applies to all the subsequent pleadings. (e) But defects in *substance* are not thus aided. (f)

(d) Bac. Abr. *Pleas*, &c. N. 6; Com. Dig. *Pleader*, Q. 7; Lawes' Pl. 167-8; Hob. 233.

(e) Bac. Abr. *Pleas*, &c. *Introd.*; Com. Dig. *Pleader*, E. 37; 7 Co. 25. a; 8 Ib. 120. b; Co. Litt. 303. b; 2 Salk. 519; 14 Mass. 162.

(f) Id.; 2 M. & G. 167; 3 Scott N. R. 753.

That is, by the adverse party's *merely pleading over*. But if he *expressly admits*, in his pleading, the matter of substance omitted by the other side, such omission is supplied and cured. Com. R. 140; 10 Wheat. 287; 9 Pick. 61.

This must still remain true, under the N. Y. Code;—defects in *substance* are not cured by answering, or replying. Thus, if the complaint does not state facts, sufficient to constitute a cause of action; though the defendant answer, and go to trial, the plaintiff can have no judgment: he must be non-suited, or have his complaint dismissed. For, *proving all that he has alleged* gives no foundation for *any judgment* in his favor. So, if the case,—being at *law*, and not in *equity*,—shows, on the trial, that there is a *want of jurisdiction* of the subject matter; no judgment can be given for the plaintiff, whether it be *so answered*, or not. So, where there is an *improper joinder* of causes of action, (even if all be put at issue, and tried,) the plaintiff cannot, thereon take *one whole judgment*, for *all* the causes: the court will not allow such a judgment to be entered;—as, for instance, a judgment for the money due on a *contract*, and also for the *return of personal property*, or the *possession of real estate*.—Calling all these defects causes for *demurrer*, cannot make the *failure to demur fatal*; when to give judgment would contravene the unchanged principles of the common law. A *defendant* may, yet, go to trial, with a case

From the principles already laid down, it is obvious that a demurrer *aids* no other pleading, than it *confesses* to be true. For what is not confessed by it, clearly cannot avail the adverse party, on the issue tendered by the demurrer; since the question of law, presented by the issue, can arise only upon facts *confessed*. (g)

And as it confesses not what is *ill pleaded*, it of course does not confess any averment, *contradicting* what before appears certain, on the record. Thus, if a party having admitted an allegation on the other side, afterwards makes an averment *inconsistent* with it, a demurrer does not confess the latter averment. (h)

On a similar principle, a demurrer, though general, never confesses an allegation, which, it appears upon the face of the pleadings, that *the pleader* is *estopped* to make: as if, having pleaded or confessed a *record*, to which he is a party, he afterwards makes an averment, *contradicting* or *impugning* it. Thus, if to debt or *scire facias*, on judgment, the defendant pleads any thing in denial of the *original* right of action, on which the judgment was founded (i)—of if, after a judgment *quod computet*, in an action of account, he pleads any matter showing that he *ought not* to account (j); a demurrer does not confess the plea: because the latter impugns the judgment. And the plea, in this case, is ill in *substance*. For it is not the *form* of the averment, but the making of it, in *any* form, that constitutes the fault. In such cases, however, the party, in whose favor the matter of the estoppel operates, may, instead

on which *the court* will give judgment against the plaintiff, on his own papers; or on his own case, when proved according to his papers. See 2 Duer, 650; 8 How. Pr. 159; 15 Ib. 500; 19 Barb. 185; 3 Seld. 464.

(g) 2 H. Black. 205, 206.

(h) Com. Dig. *Pleader*, Q. 5, 6; 1 Sid. 10.

(i) 1 Saund. 219, c. (n. 8.); Willes, 13; Lawes' Pl. 170; 3 T. R. 693; 1 Salk. 310; 6 Mod. 308.

(j) 3 Wils. 73, 101, 113, 114; Hetl. 114; Cro. Car. 116.

of demurring, *reply* the matter specially, and in this way avail himself of it.(k)

Nor does a demurrer, of either kind, confess facts, however material, the pleading of which makes a *departure*.(l)

An averment of any thing, naturally or legally *impossible*, is not confessed by a demurrer.(m) The averment being, upon the face of it, an absurdity.

So also, allegations which are *impertinent*, or *immaterial*, are not confessed, by a demurrer.(n) For what a party *cannot* contest, he does not confess, by leaving it unanswered.

Nor does a demurrer ever confess matter of *law* deduced, by either party, from the facts pleaded by him—as the *prout ei bene licuit*, in a plea of justification. For such matter is not a proper subject of a substantive averment, or of traverse, or avoidance, and consequently, not a subject of *admission* in the pleadings: it being exclusively the province of the *court*, to apply the law to the facts alleged.(o)

When an issue in *fact*, and an issue in *law*, are joined in the same cause (as they may be, to *different parts* of the declaration, plea, &c.), it is in the discretion of the court, which of the two issues shall be first determined.(p) In practice, however, the more usual course is, to determine first the issue in law: inasmuch as the jury can then, on the issue in fact, assess, at once, the whole damages on *both* issues, if both are determined in the plaintiff's favor, which could not be done, if the issue in fact were first determined.(q)

(k) Willes, 13; Lawes' Pl. 171.

(l) Com. Dig. *Pleader*, F. 10; 2 Wils. 96; 1 Ib. 122; Willes, 638; 2 Saund. 84. d. (n. 1.); T. Ray. 22. 94.

(m) 1 Sid. 10; Com. Dig. *Pleader*, Q. 6; Lawes' Pl. 168.

(n) 2 Salk. 561; Lawes' Pl. 168; Bac. Abr. *Pleas*, &c. N. 3.

(o) Hob. 56. *Vide*. Com. Dig. *Pleader*, Q. 5, 6; 3 Gray, 486; 137 Mass. 121.

(p) Co. Litt. 72, a, 125, b; Palm. 517; Bac. Abr. *Pleas*. &c. N. 1; 1 Saund. 80. (n. 1.)

(q) By the Code, the issue of law is to be first determined; unless the court specially direct otherwise. (See 12 How. P. 435.)

After an issue in fact joined, as by a conclusion to the country, on one side, and the *similiter* added, on the other, there can be no demurrer.(*r*) For the issue joined puts an end to the altercations of the parties, on the record; and by joining in it, the parties have placed the controversy upon a question of *fact* involved in the issue, and referred it to the jury.

There cannot be a demurrer, on either side, *to* a demurrer, on the other (*s*); but the party, to whose pleading a demurrer is taken, must join in it. And though a demurrer be *informally* taken; (as by praying an *improper* judgment); the adverse party must still join in it. For being sufficient to present the *whole record* to the court, for its judgment; the court must render such a judgment upon it as the state of the pleadings requires, without reference to the *manner*, in which judgment is prayed, or the *form*, in which the demurrer is expressed.(*t*)

If then, the party, to whom a demurrer is tendered, demurs *to* it, or refuses to join in it; he makes, in either case, a *discontinuance* of his action, or his defence, as the case may be (*u*). That is, if the plaintiff thus demurs, he discontinues *his action*: if the defendant does so, he discontinues his *defence*. For a refusal or omission, on one side, to join in a demurrer on the other, has the same effect as an omission to *plead*, when pleading is necessary. The omission, by either party, is therefore a virtual *abandonment* of his side of the case.

But according to a *dictum* of Ld. Holt (*v*), there is a single

(*r*) Com. Dig. *Pleader*, Q. 6; 1 Show. 213; Bac. Abr. *Pleas*, &c. N. 2.

(*s*) Com. Dig. *Pleader*, Q. 3; Bac. Abr. *Pleas*, &c. N. 2; Lawes' Pl. 172; Comb. 306; 1 Ld. Ray. 20; 1 Salk. 219.

(*t*) 3 Lev. 222.

(*u*) 1 Salk. 219; Bac. Abr. *Pleas*, &c. N. 2; Comb. 306; Com. Dig. *Pleader*, Q. 3.

(*v*) Comb. 306.

exception to the rule, that there cannot be a demurrer *to* a demurrer: viz. that where a demurrer to a plea in *abatement* is *not apposite*, the demurrer may itself be demurred to. But the reason of such an exception is certainly not obvious; and Lord *Holt's* opinion appears not to be recognized as law by the later authorities.

A demurrer, and joinder in demurrer, both usually add a *verification*, before praying judgment (*w*): but a verification appears to be unnecessary (*x*); as no *proof* is assumed, by either of the parties.

A demurrer, in whatever stage of the pleadings it is taken, reaches back, in its effect, through the *whole* record, and, in general, attaches ultimately upon the *first substantial* defect in the pleadings, on whichever side it may have occurred—defects *in substance* not being aided by the adverse party's mere pleading over, as formal defects are. (*y*)

Hence, though the parties join in demurrer, upon any one particular point, in any stage of the pleadings; judgment must, nevertheless, be given, upon *the whole* record, and regularly, against that party, in whose pleading the *first substantial* fault has occurred. (*z*) Thus if the declaration is ill,

(*w*) 2 Chitt. Pl. 679, 682.

(*x*) 1 Leon. 24; Lawes' Pl. 172.

(*y*) Hob. 56. & (n. 4.) by Williams; 5 Co. 29. a; Com. Dig. *Pleader*, Q. 7. M. 1. 2; 2 Salk. 519; 1 Saund. 285. (n. 5.); 1 Stra. 303; 2 Wils. 150; Bac. Abr. *Pleas*, &c. N. 3; 4 East, 502; 7 Wall. 82, 94.

It is a rule, that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. Thus, on demurrer to the replication, if the court think the replication bad but perceive a substantial fault in the *plea*, they will give judgment, not for the defendant, but the plaintiff, provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. *Aurora City v. West*, 7 Wall. 82, 94, citing Stephen on Pleading, 143; *Marcein v. Smith*, 2 Hill, 210; *Matthewson v. Weller*, 3 Denio, 52; *Townsend v. Jennison*, 7 How. 706.

(*z*) Id.

in substance—the plea in bar frivolous—and demurrer joined, on the *plea*; judgment must be for the *defendant*. For though the issue in law is joined, immediately and in terms, on the *plea only*, and though that is worthless; yet a bad plea is sufficient for a *bad declaration*.

Upon the same principle, if the declaration is good—the plea and replication *both ill in substance*—and demurrer joined on the replication; judgment must, regularly, be for the plaintiff. (a) For the first substantial fault is on the *defendant's* part; and a bad replication is sufficient for a *bad plea*.

But in the case last supposed, there is one exception to the general rule: viz. when the replication to an insufficient plea is not only *defective* in matter, but also shows that the plaintiff has *no cause of action*. In such a case, judgment, on demurrer to the *replication*, must be for the *defendant*—though his plea is radically insufficient. (b) For, in every such case, it will necessarily appear, from *the whole record*, that the plaintiff is not entitled to judgment.

Thus, when to a general declaration, on a penal bond, (as a bond, conditioned for the performance of covenants, &c.), the defendant pleads an *insufficient* bar, and the replication assigns as a breach, what is in law *no* breach; judgment, on demurrer to the replication, must be for the *defendant*; though his plea is ill in substance. (c) For, as in this, and all similar cases, the declaration counts only on the penal part of the bond; the real ground of the action does not appear, until a breach of the condition is assigned in the *replication*; which is, in effect, a *supplement to the declaration*—or a *specification* of the more general complaint presented in it. *In effect*, therefore, the first substantial fault in the pleadings is on the part

(a) Doug. 94–97.

(b) 8 Co. 120, b.

(c) Cro. Jac. 133, 220, 221; 3 Co. 52; 8 Ib. 120. b; 2 Bulstr. 94; Palm. 287; 1 Brownl. 105; Yelv. 152; 2 Ld. Ray. 1080.

of the plaintiff: for though, in the order of *pleading*, the plea precedes the replication; yet, in the order of *title*, the replication, in this class of cases, *precedes the plea*.

The *judgment*, rendered upon a demurrer, regularly follows the *nature of the pleading* demurred to. Thus, as we have before seen, the judgment on demurrer to a plea in *abatement*, if for the defendant, is that the writ be *quashed*—and if for the plaintiff, that the defendant *answer over*. And thus the form of the judgment corresponds to that of the *prayer* of judgment in the demurrer. (*d*)

In like manner, when a demurrer is joined on any of the pleadings *in chief*—as on the declaration, plea in bar, or other pleading, which goes to *the action*, the judgment is *final*—i. e. if for the plaintiff, it is *quod recuperet*; if for the defendant, it is, *quod eat sine die* (*e*): so that, on demurrer to any of the pleadings, which go to *the action*, the judgment, for either party, is the same as it would have been, on an issue *in fact*, joined upon the same pleading, and found in favor of the same party. If the defendant demurs to the *declaration*, but concludes in *abatement*, (as by praying judgment, that the writ be *quashed*); the plaintiff may join in the demurrer, as *in bar*, by praying judgment, that his debt, or damages, be adjudged to him; and if his declaration be good, he shall have judgment, *quod recuperet*. For by the demurrer, the declaration is *confessed* (*f*): and the defendant's having prayed judgment, as in *abatement*, cannot alter or impair the effect of that confession.

A judgment, rendered upon demurrer, is equally conclusive, (by way of *estoppel*), of the facts, confessed by the demurrer,

(*d*) By the Code, almost any extent of amendment is allowed, after demurrer decided: and § 723 of the New York C. C. P. would almost allow an entirely *new case* to be made up. 7 How. Rep. 294, 11 Ib. 168; 15 Ib. 399, 555; 7 Barb. 13; 9 Ib. 202; 22 Ib. 161.

(*e*) Bac. Abr. *Pleas*, &c. N. 4; 10 Co. 58; 1 Wall. 43.

(*f*) 3 Lev. 223; Com. Dig. *Pleader*, Q. 3; Lawes' Pl. 172. [And see *Clearwater v. Meredith*, 1 Wall. 26, 42].

as a verdict, finding the same facts, would have been (g): since they are established, as well in the former case, as in the latter, by *matter of record*. And facts, thus established, can never afterwards be contested, between the same parties, or those in privity with them.

If therefore, on demurrer to the declaration, to the plea in bar, or to other pleading *in chief*, judgment is rendered for *the defendant*; the plaintiff can never afterwards maintain, against the same defendant or his privies, any *similar or concurrent* action, for the same cause; i. e. upon the *same grounds*, as were disclosed in the first declaration. (h) For the judgment, upon such a demurrer, determines *the merits* of the cause; and a final judgment, deciding *the right* in controversy, must put an end to the dispute—or litigation would be endless.

But if the plaintiff, on demurrer, fails in his first action, from the omission of an *essential allegation* in his declaration, which allegation is supplied in the second; the judgment in the first is no bar to the second, although both actions were brought to enforce the same right. (i) For in this case, the *merits* of the cause, as disclosed in the second declaration, were not decided in the first.

Upon the same principle, if the declaration is adjudged ill, on demurrer, because the action is *misconceived*, (as if *debt* or *assumpsit* is brought, where *account* is the only remedy; or if *trespass* is brought, where the only proper action is *trover* or *detinue*); the judgment is no bar to a *proper* action, afterward brought for the same cause. (j) For in this case, as in

(g) 6 Co. 7; Cro. Eliz. 668; 2 Black. R. 827; Peake Ev. 36, (2d ed.); 1 Mod. 207; Bac. Abr. *Pleas*, &c. I. 13; 1 Freem. 198-9.

(h) Id.

(i) 1 Mod. 207; 1 Chitt. Pl. 195; Bac. Abr. *Pleas*, &c. I. 13.

(j) Cro. Eliz. 668; 2 Vent. 169, 170; T. Ray. 472; Polxf. 634; 2 Brownl. 339; 2 Black. Rep. 779, 827, 831; Cro. Car. 35; 1 Chitt. Pl. 195.

"There is no question but that if a man mistakes his declara-

the last, the *merits* of the cause could not be determined in the first action.

tion and the defendant demurs, the plaintiff may set it right in a second action." Per North, C. J., in *Lampen v. Kedgewin*, 1 Mod. 207, *quoted* with approval in, *Wilbur v. Gilmore*, 21 Pick. 253.

Further of DEMURRERS under the Codes, see Code of Civil Procedure Annotated (North Carolina), 3rd ed., § 238 *et seq.*, by Judge Waller Clark, one of the best of the local books of practice.

APPENDIX.

APPENDIX I.

(NOTE TO PAGE 72).

The statement of the text is very manifest from the established form, in which defence is made. That form—when the defence is *full*, and expressed in full—is the following;—‘ And the said C. D.’ (the defendant), ‘ by E. F. his attorney, comes and defends the wrong and injury, (or force and injury), when and where it shall behove him, and the damages, and whatsoever else he ought to defend.’ Bac. Abr. Pleas, &c. D. Co. Litt. 127, b; Lawes’ Pl. 89; 2 Chitt. Pl. 409; 2 Saund. 209, c. Now it would be absurd to suppose that the defendant in saying that he ‘ defends ’ the wrong and injury, is to be understood, as *justifying* them—not only, because a wrong cannot, in the nature of the thing, admit of justification; but also because the defendant may, with legal consistency, as he frequently does, subjoin at the close of his defence, a *denial* of what the plaintiff complains of as a wrong. 3 Black. Com. 297. In writs of *entry* also, when no injury is alleged, and when of course none can be denied (as the demandant states only his own *right*, and the defective title of the tenant, or defendant, without complaining of any *wrong*), the tenant *defends* the *demandant’s right*. And in writs of *right*, the tenant, for the same reason, always *defends* the *right* and *seisin* of the demandant (Ibid.) examples, which decisively show that the meaning of the word *defence*, in pleading, is that which has now been assigned to it.

It is obvious then, that to make *defence* is to *resist* the plaintiff’s suit; the reasons or grounds of which resistance must appear in the plea, which follows the defence.

Half defence, in the form in which it was anciently distinguished from *full*, is thus expressed: 'And the said C. D. by E. F. his attorney' (or 'in his own proper person'), 'comes, and defends the force (or wrong) and injury'—omitting the sequel, in the above form of full defence. Co. Litt. 127; 2 Saund. 209, c. n; Bac. Abr. *Pleas*, &c. D; 2 Chitt. Pl. 409.

Half defence is adapted to pleas, which deny the jurisdiction of the court, or the *legal competency* of the plaintiff to prosecute. *Full* defence is an implied *waiver* of these two preliminary exceptions; because, by defending '*when and where* it shall behove him' the defendant is considered as impliedly acknowledging the *jurisdiction* of the court; and by defending '*the damages, and whatsoever else* he ought to defend,' he is deemed virtually to admit the plaintiff's *competency* to sue. Com. Dig. *Abatement*, I. 16.

Full defence, however, is adapted, it seems, to *all other* pleas than those last mentioned. But to any other pleas than those, half-defence is not apposite; and consequently, *half* defence, when coupled with a plea of any other kind, is fatal to it. Co. Litt. 127, b; Bac. Abr. *Pleas*, &c. D; Lawes' Pl. 90; 3 Lev. 240. For such defence impliedly *waives* all exceptions, other than those, to which the two pleas above mentioned are adapted; and is therefore inconsistent with all others.

As to the difference, between the effect of *full* and of *half* defence, there is, however, some contradiction and confusion, in the books. According to some, full defence would seem to be improper for a dilatory plea, of *any* kind. Com. Dig. *Abatement*, I. 16. The distinction above expressed appears, however, to be the established one.

Much importance was formerly attached to these different modes of making defence; and any deviation from that form, which the nature of the plea required, gave occasion to many critical and subtle exceptions. These exceptions, however, being merely technical, were, at a subsequent period, much dis-

countenanced, and now seldom or never occur. For though the distinction between full and half defence still exists theoretically; yet the *forms*, by which they were originally distinguished, and which have already been recited, have lost their practical importance, by becoming obsolete: since, according to modern usage, neither of those precise forms is employed; but the defendant, by adding to the ancient form of *Half-defence*, as before recited, merely the words 'when, &c.' is at liberty to connect it with either species of plea: the '&c.' being construed to imply either *full* or *half* defence, as the subject matter of the plea may require. 8 T. R. 633; Willes, 40; 2 Saund. 209, c. (n); Lawes Pl. 92; 2 Chitt. Pl. 409, (n. o.)—*Contra*, Sty. 273; 3 Black Com. 298.

It must be acknowledged, however, that the rules, relating to the forms of *defence* in pleading, are very artificial, not to say arbitrary. It is, at least, very difficult to discover on what original *principle*, defence of either kind is, or ever was, necessary: since it amounts only to an *indefinite* introductory suggestion of what must, afterwards, appear distinctly in the plea. Indeed, in certain actions, in which force and injury are, and must be, alleged, viz., in trespass for an assault, or for breaking the plaintiff's close, *no* defence is required, merely because the ancient precedents contain none, in either of those two classes of cases. Bac. Abr. *Pleas*, &c. D; Lawes' Pl. 90–91. Yet, if the *essential principles* of pleading required defence to be made, in any case, it would seem as necessary in those particular actions, as in any other.—But however this may be, want of defence, when required by the foregoing rules, is still regarded as a defect, though only as a defect in form. 3 Salk. 271; Lawes' Pl. 92.

APPENDIX II.

NOTE TO PAGE 74).

Imparlances are of three kinds, of which the first is called *general*—the second, *special*—and the third, *general-special*, or (according to Sir William Blackstone) *more special*. 1 Tidd, 417; 3 Black, Com., 301; Lawes' Pl., 94. A *general* imparlance is one, granted upon a prayer, in which the defendant reserves to himself *no exceptions*; (Mack v. Lewis, 67 Vt. 383); and imparlances of this kind are always from one term to another: (1 Tidd, 417; 6 Mod. 28; Lawes' Pl., 94; whereas *special*, and *general-special* imparlances may extend only to a future day, in the *same* term, in which they are granted (Com. Dig. *Pleader*, D. 1; 1 Tidd, 417). After a *general* imparlance, the defendant can plead only to the *merits*, or, in legal phrase, to *the action*; and is, of course, precluded from pleading to the jurisdiction of the court, the disability of the plaintiff to sue, or the form of the writ. 3 Black. Com. 301; 1 Tidd, 418; 1 Mass. 347. For by asking leave to imparl, without reserving any right of exception, in any of these particulars, he tacitly *acknowledges* the jurisdiction of the court, and waives all objections, which do not go to the *right of action*.

An imparlance is said to be *special*, when the prayer, upon which it is granted, contains the clause, 'saving to himself all advantages and exceptions, as well to the *writ*, as to the *declaration* aforesaid.' 2 Chitt. Pl. 407-8; 2 Saund. 2. (n. 2.); Lawes' Pl. 94. If the suit was commenced by *Bill*, the saving should be 'of all advantages and exceptions to the said bill.'

'After an imparlance of this kind, the defendant is at liberty to plead, as well in *abatement* as to the *action*; i. e. to offer, in his plea, exceptions either to the *writ* or the *count*. 1 Tidd, 418; Lawes' Pl. 94. For the benefit of all such exceptions is reserved to him, by the granting of his prayer, in which there is an express reservation of them. But he cannot, after a special imparlance, plead to the *jurisdiction of the court*. Id. For exceptions to the jurisdiction are not, in this case among those reserved in the defendant's prayer for leave to imparl; and the act of praying such leave, without saving exceptions to the *jurisdiction*, is an implied admission of it.

A *general-special* imparlance is one in which the defendant reserves 'all advantages and exceptions *whatsoever*.' 2 Chitt. Pl. 408. This kind of imparlance not only leaves the defendant at liberty to plead whatever he might have pleaded, under a *special* imparlance, but does not preclude him from pleading to the *jurisdiction* of the court. 1 Tidd, 418; 1 Lev. 54. For as the prayer for leave to imparl expressly reserves *all* exceptions; such as go to the jurisdiction are of course reserved, as well as others. He cannot, however, after an imparlance of either kind, plead a *tender*, with a *touts temps prist*, (an averment that he was *always ready* to pay): for by asking *delay*—as he does, by praying for leave to imparl, he practically admits that he is *not then* ready to pay what the plaintiff demands; and thus his prayer for leave to imparl would falsify the plea. 1 Tidd, 418; 2 Salk. 622; 2 Mod. 62; Reg. Pl. 56.

If the defendant, after an imparlance, pleads any thing, which the imparlance *waives* or *falsifies*; the plaintiff may sign judgment against him, as for *want* of a plea. 1 Tidd, 419; 4 T. R. 520; 7 id., note (*d*). For a plea, pleaded out of the regular course or order of pleading, may be treated as a *nullity*. Or, instead of signing judgment, the plaintiff may, in such a case, move the court to set aside the plea as being irregular (6 T. R. 373); or he may *demur* to it (1 Wils. 261; 1 Black. 51; 6 T. R. 369; 2 Bos. & Pul. 384; 2 M. & S. 484); for the

matter pleaded, whatever it may be, appears upon the face of the record to be *ill* pleaded. Or finally, he may *specialy reply* the imparlance, by way of *estoppel* (1 Tidd, 419); i. e. by showing in his replication, that the defendant is *precluded*, by his own act apparent upon the record, from availing himself of the matter alleged in his plea. For whenever a party, in pleading, *contradicts* what he has before alleged or admitted upon the record, his previous allegation or admission, may be pleaded, *as conclusive* against him. But if the plaintiff, instead of taking any of these advantages, *answers the matter* of the plea; it will stand as if pleaded without an imparlance. 1 Vent. 236. For by omitting to object to it as irregular, or out of course, he *waives* all exceptions to it, in these particulars; or in other words, all exceptions to its *admissibility*.

The *principle*, which lies at the basis of the foregoing rules remains; though the *forms*, to which they relate, are taken away from the New York practice. A party who appears in court, and, without any objection to its jurisdiction, takes any step in the cause, *submits* to the jurisdiction.

APPENDIX III.

(NOTE TO PAGE 237).

The expositions in the text appear correct, as far as they extend. In other words, they conform to the points adjudged, in the particular cases, to which they relate; but if considered as intended to furnish a comprehensive criterion, applicable to all cases to which they may extend, they will often be found, it is believed, to afford but little assistance to the inquirer. The only practicable method, perhaps, of acquiring a competent knowledge of the distinction in question, is a careful and thorough examination of precedents.

It is however material to be observed, that neither of these *two first* degrees of certainty requires the pleader to allege anything more than is necessary to constitute, *prima facie*, a right of action, or a legal defence. He is, therefore, not obliged to deny or avoid, by *anticipation*, any of the possible answers which may be given, on the other side, to the matter alleged in his pleading. And therefore in declaring on a contract, the plaintiff is not bound to aver that the defendant, at the time of contracting, was *not* an infant, or *feme covert*—or that the contract was *not* obtained by fraud, or duress, or has not been released—or any other such special matter as might if alleged and proved on the other side, defeat this action. For if any such matter exists, it is matter of *defence*, to be shown by the defendant. And the same principle governs, in special pleas in bar, and other pleadings to the *action*, on the part of the defendant. *Morehouse v. Fowler*, 69 Ill. App. 50.

It is necessary indeed for a plaintiff, declaring on contract, to allege that the debt has *not been paid*, or the agreement not performed—not, however, by way of *anticipating* the defence of payment or performance, but because, without such an allegation, no breach of the contract, and of course no *prima facie* right of action, will appear in the declaration.

APPENDIX IV.

(NOTE TO PAGE 379).

Avowries and Cognizances.

In connexion with the *declaration*, it is proper to present a brief outline of *avowries and cognizances*, which are pleadings on the part of the defendant in *replevin*, and are peculiar to that action. 3 Black. Com. 150; Lawes' Pl. 78. These pleas are introduced in this connexion, because they both partake of the nature, as well of *declarations*, as of special pleas *in bar*. Id.; 2 Saund. 195; Esp. Dig. 360; Bac. Abr. *Replevin*, A. K. For they not only justify, by way of *defence*, the taking of the goods or cattle, the taking and holding of which, by the defendant, is complained of by the plaintiff in *replevin*; but also demand a judgment *quod recuperet*, viz. for the *return* of the goods, &c. to the defendant—or as the case may be, for *damages*—for the security or satisfaction of some claim, asserted by the defendant against the plaintiff; as *rent* due to the former, or damage done to him by the cattle distrained and replevied. Bac. Abr. *Replevin*, A. K.; 3 Black. Com. 150; Lawes' Pl. 78.

Avowries and cognizances are substantially the same, and differ from each other only in name, and form. When the defendant in *replevin* justifies, and claims a return of the goods, &c. or damages in *his own* right, or in that of his *wife*, he begins his pleading, by averring that he 'well *avows* the tak-

ing' of the goods, &c. and then proceeds to state his claim—as *rent due, damage done by the plaintiff's cattle, &c.* 2 Chitt. Pl. 508, 513; 3 Black. Com. 150. But when he justifies, as bailiff or servant to *another*, and in the latter's right, he begins by saying that he 'well *acknowledges* the taking,' &c.; and then proceeds, as in the former case. 2 Chitt. Pl. 509, 513; 3 Black. Com. 150. In the case first stated, the plea is called an *avowry*; in the latter, a *cognizance*: these two denominations being derived, it seems from the *terms*, in which the pleas respectively commence.

When the defence in replevin consists of matter of *justification only*, without claiming a judgment *quod recuperet*, an avowry, or cognizance, is not only necessary, but improper; since a *simple* justification (as in trespass, &c.), is, in such a case, all that the nature of the defence can require. Com. Dig. *Pleader*, 3 K. 12; Lawes' Pl. 86.

Under sections 500, 501, of the New York Code, such claims of a defendant, ('arising out of the contract or transaction set forth in the complaint') would come in by way of *counter-claim*; on which the defendant asks an *affirmative judgment* in his favor. Of course, a *reply* would be required, from the plaintiff.

But when the defendant makes an *avowry*, or *cognizance*, it partakes of the nature of a *declaration*, and both parties are virtually *actors*, or plaintiffs. An avowry, &c. is of the nature of a declaration, not only in the *recovery* which it demands; but also in this—that it may be the subject of a plea in *abatement*, and is not required to conclude with a *verification*. Bac. Abr. *Replevin*, A.; 1 Salk. 94; 2 Wils. 117; Lawes' Pl. 82; Cro. Eliz. 530, 798; Carth. 122; 6 Mod. 103; Yelv. 148-9.

Under the statute 4 Ann. c. 16 § 4, allowing a defendant to plead several different pleas to one declaration, the defendant in replevin may plead several *avowries*, &c.; and on the other hand, the plaintiff in replevin may plead several pleas *in bar* of the avowry, &c. Lawes' Pl. 82.

It is unnecessary, however, to treat of avowries, in the present connexion, in *detail*: since, *as declarations*, they are governed by the same general rules as other declarations, in personal actions; and as *special pleas in bar*, must have the same properties or requisites, as other pleas of that class.

APPENDIX V.

(NOTE TO PAGE 420).

Outlawry.—If *two* sue as co-plaintiffs, in a personal action, a plea that *one* of them is an outlaw, will if established, defeat or suspend the suit, as to both. Com. Dig. *Abatement*, E. 2. For as they sue *jointly*, and of course assert a *joint* right; they must recover *jointly*, or not at all, in that suit.

That the plaintiff is an outlaw, is *always* pleadable to his *disability*, and in some cases it can be pleaded in no other way; in others, it may be pleaded either to his disability, or in *bar*. Bac. Abr. *Abatement*, L.; Co. Litt. 128. b. And the distinction between these different cases, is the following:—

If the *right of action* is not *forfeited* by the outlawry—(as where the action is for an injury to the person; such as *battery*, *slander*, &c.; and in general, where the damages demanded are altogether presumptive)—this defence goes only to the *disability* of the plaintiff, and is not pleadable in *bar* (Bac. Abr. *Outlawry*, D. 4; (3.); Ib. *Abatement*, L.; Co. Litt. 128. b; 1 Chitt. Pl. 473; 5 Co. 109; 2 Lill. Ab. 333; Ow. 22; 3 Lev. 29): because rights of action, of this kind, are not in their nature forfeitable by crimes.

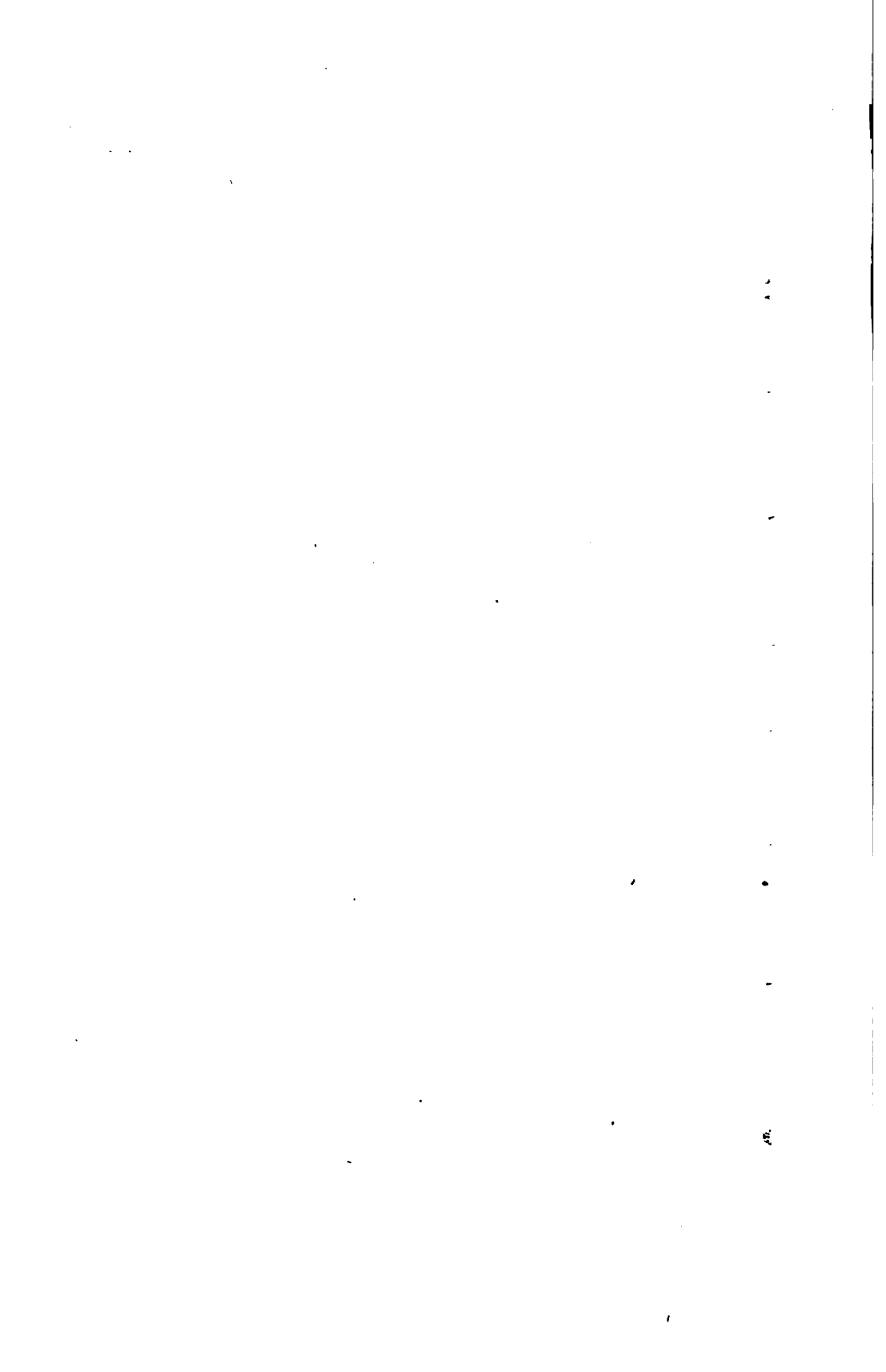
But a judgment of outlawry, which works a *total forfeiture* of the outlaw's property, (as where he is outlawed on a charge of *felony*.) may in general, be pleaded either to his disability, or in *bar*, in all suits in which he asserts a *right of property*. Bac. Abr. *Outlawry*, D. 4, (3); *Abatement*, L.; Com. Dig. *Pleader*, 2 G. 4; 1 Chitt. Pl. 473; Lawes' Pl. 38. 104. For by such a judgment, the right of action is itself, by the common

law, forfeited to the Crown or State. As to outlawry in the United States, see, *Republica v. Doan*, 1 Dall. 86; *Drew v. Drew*, 37 Me. 389.

Attainder of treason or felony, by the common law, disables the party attained, to prosecute any civil action, and may therefore, (like a judgment of *outlawry* for such an offence), be pleaded to his disability, when plaintiff in a suit. 3 Black. Com. 301; 4 Ib. 112, 380-2; Com. Dig. *Abatement*, E. 3. For by the attainder, the traitor or felon is *civilly* dead. 4 Black. Com. 380; 3 Inst. 213.

Præmunire, (or the offence of maintaining the *Papal* power in the realm of England)—*Popish recusancy*—and *Monachism*, i. e. being a *Monk professed*, were, by the common and statute law of England, respectively pleadable to the plaintiff's disability. 3 Black. Com. 301-2; 4 Ib. 112; Com. Dig. *Abatement*, E. 5. But neither of these disabilities, I trust, is recognized by the laws of any of the United States.

Excommunication is also by the law of England, a civil disability, and as such pleadable to the person of an excommunicated plaintiff, suing either in his own right, or in the character of executor or administrator. Godolph. 85; 3 Black. Com. 301; Bac. Abr. *Abatement*, B. 2. The excommunication of the plaintiff does not however *destroy* the suit, but merely *suspends* it until the plaintiff has obtained *absolution*. Bac. Abr. *Abatement*, B. 2; *Vide* St. 51 Geo. III, c. 127. This disability also is unknown to the laws of this country.



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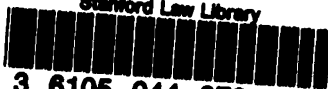
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